147

(1)

Supreme Court, U.S.
FILED

No. 09-692 DEC 11 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMIE OLIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

TED W. CASSMAN
(*Counsel of Record*)
RAPHAEL M. GOLDMAN
ARGUEDAS, CASSMAN & HEADLEY, LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 845-3000

Counsel for Petitioner Jamie Olis

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the offenses of mail and wire fraud, which punish "any scheme or artifice to defraud, or for *obtaining* money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. §§ 1341, 1343 (emphasis added), include as a necessary element seeking to *obtain* money or property from a victim, rendering erroneous a jury instruction that requires the jury to find only that the defendant sought "to *deprive* another of money or property."

2. Whether the Fifth Circuit failed to properly apply this Court's decision in *Parr v. United States*, 363 U.S. 370 (1960), by permitting a wire fraud conviction based upon a wired SEC filing that the law required to be sent, but was not shown to be substantively false or incorrect.

3. Whether, when the United States Attorney's Office intentionally interferes with a criminal defendant's contractual right to have his employer provide funding for his defense, the resultant Sixth Amendment violation works a "structural" error that requires no particularized showing of prejudice.

4. Whether the Fifth Circuit improperly declined to issue a certificate of appealability under this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) – which held that a certificate must issue after denial of a petition to set aside a conviction pursuant to 28 U.S.C. § 2255 if the petition raises claims the resolution of which are

QUESTIONS PRESENTED – Continued

"debatable among jurists of reason" – when the district court's decision conflicted with decisions of other federal courts in other Circuits.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS BELOW	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
A. Project Alpha and Olis' Trial	4
B. Olis' Motion to Set Aside His Conviction	8
C. The District Court's Denial of the § 2255 Motion and a Certificate of Appealability	17
D. The Court of Appeals' Decision Denying a Certificate of Appealability	18
REASONS FOR GRANTING THE PETITION	19
I. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT CONCERNING THE "SCHEME TO DEFRAUD" ELEMENT OF MAIL AND WIRE FRAUD	22
II. THIS COURT SHOULD PROVIDE CLARITY CONCERNING THE *PARR* RULE, AND RESOLVE A CIRCUIT SPLIT ON THE APPLICATION OF THAT CASE	27

TABLE OF CONTENTS – Continued

Page

III. THIS COURT SHOULD RESOLVE THE VITAL QUESTION WHETHER THE GOVERNMENT'S INTENTIONAL INTERFERENCE WITH A DEFENDANT'S DEFENSE FUNDING WORKS A "STRUCTURAL" CONSTITUTIONAL ERROR THAT REQUIRES NO PARTICULARIZED SHOWING OF PREJUDICE 31

IV. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE PROPER STANDARD FOR DETERMINING WHETHER TO GRANT A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. § 2253 35

CONCLUSION 37

TABLE OF APPENDICES

Order of the United States Court of Appeals for the Fifth Circuit Denying Petitioner's Request for a Certificate of Appealability, Filed August 13, 2009 ..... App. 1

Order of the United States District Court for the Southern District of Texas, Filed November 21, 2008 ..... App. 17

Order of the United States Court of Appeals for the Fifth Circuit Denying Petitioner's Motion for Reconsideration, Filed September 14, 2009 ..... App. 109

TABLE OF AUTHORITIES

Page

CASES

Black, et al. v. United States, No. 08-876, 129 S. Ct. 2379 (2009) 26

Carpenter v. United States, 484 U.S. 19 (1987) 28

Cleveland v. United States, 531 U.S. 12 (2000) 22

Hohn v. United States, 524 U.S. 236 (1998) 1

McNally v. United States, 483 U.S. 350 (1987) 22, 25, 28

Miller-El v. Cockrell, 537 U.S. 322 (2003) 36

Monterey Plaza Hotel Ltd. P'ship v. Local 843 of Hotel Employees, Rest. Employees, 215 F.3d 923 (9th Cir. 2000) 25

Parr v. United States, 363 U.S. 370 (1960) ..... *passim*

Porcelli v. United States, 404 F.3d 157 (2d Cir. 2005) 25, 26

Schmuck v. United States, 489 U.S. 705 (1989) 29

Skilling v. United States, No. 08-1394, 130 S. Ct. 393 (2009) 26

Slack v. McDaniel, 529 U.S. 473 (2000) 36

Sorich, et al. v. United States, No. 08-410, 129 S. Ct. 1308 (2009) 26

Strickland v. Washington, 466 U.S. 668 (1984) 33, 34

United States v. Baldinger, 838 F.2d 176 (6th Cir. 1988) 23

United States v. Boyd, 606 F.2d 792 (8th Cir. 1979) 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002) 29

United States v. Cronic, 466 U.S. 648 (1984) 33

United States v. Cross, 128 F.3d 145 (3d Cir. 1997) 28

United States v. Curry, 681 F.2d 406 (5th Cir. 1982) 28

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 32, 33, 34

United States v. Gray, 790 F.2d 1290 (6th Cir. 1986) 28

United States v. Green, 786 F.2d 247 (7th Cir. 1986) 29

United States v. Hedaithy, 392 F.3d 580 (3d Cir. 2004) 25

United States v. Herron, 825 F.2d 50 (5th Cir. 1987) 28

United States v. Lake, 472 F.3d 1247 (10th Cir. 2007) 28, 29

United States v. Lew, 875 F.2d 219 (9th Cir. 1989) 24, 25

United States v. Olis, 429 F.3d 540 (5th Cir. 2005) 8

United States v. Olis, No. H-03-217-01, 2006 WL 2716048 (S.D. Tex. Sept. 22, 2006) 8

United States v. Stein, 541 F.3d 130 (2d Cir. 2008) 10, 32, 34

TABLE OF AUTHORITIES – Continued

Page

United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) 32

United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) ..... *passim*

United States v. Walters, 997 F.2d 1219 (7th Cir. 1993) 23, 24

Weyhrauch v. United States, No. 08-1196, 129 S. Ct. 2863 (2009) 26

CONSTITUTION

U.S. Const. amend. VI ..... *passim*

STATUTES AND REGULATIONS

15 U.S.C. § 15m(a) 29

18 U.S.C. § 1341 ..... *passim*

18 U.S.C. § 1343 ..... 3, 22, 25, 26, 27

18 U.S.C. § 1346 ..... 26, 27

28 U.S.C. § 1254 1

28 U.S.C. § 2241 4

28 U.S.C. § 2253 ..... 21, 35, 36, 37

28 U.S.C. § 2255 ..... *passim*

17 C.F.R. § 240.13a-13 29

17 C.F.R. § 249.308a 29

17 C.F.R. § 249.310 29

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Comment, *The Intangible Rights Doctrine and Political-Corruption Prosecutions Under the Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980) 23

OPINIONS BELOW

The decision of the United States District Court for the Southern District of Texas denying petitioner's motion pursuant to 28 U.S.C. § 2255, and denying a certificate of appealability, App. 17-108, is unreported. The opinions of the Fifth Circuit Court of Appeals denying a certificate of appealability, App. 1-16, and denying petitioner's motion for reconsideration, App. 109, are also unreported.

JURISDICTION

The Fifth Circuit Court of Appeals denied petitioner's request for issuance of a certificate of appealability on August 13, 2009. App. 16. The Court of Appeals denied petitioner's motion for reconsideration on September 14, 2009. App. 109. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998) ("We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered

> by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or

> emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Petitioner Jamie Olis was convicted after a trial in the United States District Court for the Southern District of Texas of various offenses, including mail and wire fraud. App. 2, 18. This petition arises from Olis' subsequent motion pursuant to 28 U.S.C. § 2255 to set aside his conviction; the Southern District of Texas had jurisdiction of the § 2255 motion under 28 U.S.C. §§ 2241(c) & 2255.

A. Project Alpha and Olis' Trial

The charges in this case arose from "Project Alpha," a gas-trading transaction then considered to be the most complicated ever consummated. App. 2, 23-25. Olis' employer, Dynegy Inc., entered into the transaction in part to close a gap on its accounting books between cash flow and earnings. App. 2, 23-25. Olis, a mid-level manager in Dynegy's tax department, was assigned to work on the transaction, in which numerous business entities participated. App. 24. The accounting firm Arthur Andersen marketed the original transaction to Dynegy and then served as

Dynegy's tax advisor and auditor for the project. App. 2, 24; Supp.2 R. 74-80.[1] Arthur Andersen's audit team was led by Jim Hecker, the firm's engagement partner. App. 2, 67, 69.

The indictment alleged that Project Alpha was a scheme to falsely report financing activity – i.e., a loan – as cash flow from operations. App. 62-66. At trial, however, the government eschewed the indictment's central allegation that Project Alpha was a scheme to report a substantively incorrect accounting result, instead arguing that the fraud arose from the alleged conspirators' efforts to hide certain features of Project Alpha to which Jim Hecker objected. App. 8, 66-69. Accordingly, from its opening statement through closing argument, the prosecution explicitly stated that it did not matter whether the alleged conspirators intended to cause revenue from Project Alpha to be mischaracterized as revenue from operations, as opposed to financing. Supp.2 R. 1490, 1529, 1654-72. As the prosecution told the jury in its opening statement, the only issue was whether Olis and his alleged co-conspirators hid "outside hedges" and "tear-up agreements" from Jim Hecker. The prosecution told the jury that "this case is not about accounting, it's concealment. It doesn't matter if Jim Hecker was right or wrong. It just matters that he didn't have all the information in front of him when he

---

[1] This petition will cite to the record on appeal in the format "R. [page number]." The petition will cite to Supplements # 1 and 2 to the record in the format "Supp.1 R. [page number]."

made the decision." Supp.2 R. 1654-72. The prosecution repeated this refrain during closing arguments: "Now, right or wrong, Mr. Hecker set the rules. That is at the heart of this case. Mr. Hecker was the gatekeeper. It doesn't matter whether some other accountant would have set different rules. He was the gatekeeper. He was the person who had to give his approval." Supp.2 R. 1529. Thus, the government's trial theory was that Olis could be guilty of the fraud charges even if Hecker's opinions were wrong, even if the accuracy of Dynegy's financial statements would not be affected by the outside hedges and linked tear-ups to which Hecker objected, and even if Olis did not believe or intend that the filings submitted to the SEC were false or misleading.

Indeed, the prosecution's trial proof conformed to this theory of the case. The government's wire fraud charges were predicated upon Dynegy's filings with the SEC, which reported data that were based upon the accounting results generated by Project Alpha. App. 92-94. But the government proffered no evidence that the SEC filings were substantively false or that the accounting resulting from Project Alpha was incorrect. Instead, the government's evidence and argument sought only to demonstrate that Olis and his alleged coconspirators tricked Arthur Andersen, in the person of Jim Hecker, into approving the accounting by concealing the outside hedges and tear-up agreements. App. 13; *see also* R. 1670-71.

Furthermore, the government presented no evidence that Dynegy and the alleged conspirators, in

employing Project Alpha, sought to *obtain* any money or property as a result of the charged scheme. The government asserted that the accounting resulting from Project Alpha caused Dynegy's stock price to be artificially inflated, but it did not show that Dynegy or any conspirator sold or issued Dynegy stock during the period of the alleged scheme, or otherwise attempted to obtain money or property from any victim alleged in the indictment. *See* R. 4215-16.

Nonetheless, these insufficiencies in the evidence were not fatal to the government's prosecution because the district court erroneously instructed the jury on several key points. First, as to the mail and wire fraud charges, the court defined the required "scheme to defraud" as "any scheme to *deprive* another of money or property." App. 14 (emphasis added). As we will discuss, Olis claims that this instruction was erroneous because the mail and wire fraud statutes require a scheme to *obtain* money or property from a victim. Second, the court instructed the jury concerning the wire fraud charges that "[i]t is not necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent." App. 13. Again, that instruction erroneously stated the law. Under *Parr v. United States*, 363 U.S. 370, 390-91 (1960), the government was in fact required to prove that the wired materials were themselves false or fraudulent. Unfortunately, Olis' trial counsel did not object to either of the erroneous instructions. App. 13-14.

Olis was convicted of securities fraud, mail and wire fraud, and conspiracy. App. 18. The district court initially sentenced him to 292 months in prison. App. 18. On direct appeal, the Fifth Circuit affirmed Olis' conviction, but vacated the sentence and remanded for resentencing. App. 18-21; *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). On remand, the district court sentenced Olis to a term of 72 months. App. 21; *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048 at *13 (S.D. Tex. Sept. 22, 2006).

B. Olis' Motion to Set Aside His Conviction

Olis filed his motion to set aside his conviction pursuant to 28 U.S.C. § 2255 on October 5, 2007. App. 17; R. 1425-30. The motion made several claims; as relevant to this petition, the claims were as follows:

Ineffective Assistance of Counsel: Olis claimed that his trial counsel was constitutionally ineffective for failing to object to the erroneous instructions discussed above. App. 13-14, 91-102; *see also* R. 1693-98.

Government Interference with Olis' Right to Counsel: Olis also claimed that the United States Attorney's Office ("USAO") acted purposefully to sabotage Olis' ability to prepare and defend his case at trial by blocking funding from Dynegy, despite the fact that Dynegy was legally and contractually obligated to fund Olis' defense, and thereby violated Olis' Sixth Amendment rights. App. 4-5, 37-38; *see also* R. 1629-67.

There was never any dispute that Dynegy had a legal obligation – under its articles of incorporation, Board of Directors' resolutions, and specific contractual agreements with Olis – to advance to Olis funding for his defense in the criminal case arising from Project Alpha. App. 5, 27-28; *see also* R. 1631-34. After Olis was indicted, Dynegy initially complied with this obligation. App. 27-30. But the USAO quickly caused Dynegy to begin withholding funds. App. 30.

Testimony in a civil suit by Olis' trial counsel against Dynegy demonstrated the extent of the government's meddling. According to the testimony in that action, Dynegy was extremely anxious to cooperate with the government investigation in the hope of avoiding indictment. Bruce Williamson, Dynegy's CEO, believed that an indictment would destroy the company. R. 1953-59. Thus, when Assistant United States Attorney Jimmy Sledge sent Williamson a letter on January 9, 2003, complaining that Dynegy employees were not fully cooperating, Williamson was worried. R. 1953-59. Williamson immediately called the United States Attorney for the Southern District of Texas, Michael Shelby, and set up a meeting for the next day. R. 1944-45.

At the meeting, Shelby presented Williamson with the so-called "Holder Memorandum," a United States Department of Justice policy document setting forth guidelines for determining when to indict a company. R. 1912-14, 1945-52, 1956-58. The Holder Memorandum, officially titled *Federal Prosecution of*

Corporations, advised that companies that paid for their employees' legal defenses should be deemed uncooperative. The memorandum set forth considerations for making the charging decision, including "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." In a later provision, the memorandum stated:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending upon the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

The memorandum also emphasized the importance of the corporation's willingness to waive its attorney-client privilege and work product protections. R. 1950-52; *United States v. Stein*, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) ("*Stein I*"), *aff'd* 541 F.3d 130 (2d Cir. 2008).

According to Williamson's testimony, at the January 10 meeting, Shelby "didn't serve much up except the Holder memo," and it was "served pretty

cold." R. 1957. Shelby essentially told Williamson, "If you don't cooperate, we are going to get your company." R. 1957-58. Williamson got the message: he promised to fully cooperate, as that term is used in the Holder Memorandum, including waiving the company's attorney-client and work product privileges. R. 1921-22, 1950-52, 1963-65, 1972-73, 2983-84. Williamson even promised to "make available, on any topic with which [the government] need[ed] assistance, a consulting expert from the company." R. 2983-84. Williamson walked out of the meeting "a few pounds lighter." R. 1958.

On January 20, 2003, the Department of Justice released the "Thompson Memorandum," a policy document superseding the Holder Memorandum. The Holder Memorandum's "language concerning cooperation and advancing of legal fees by business entities was carried forward without change." *Stein I*, 435 F. Supp. 2d at 338; App. 31 n.25. "Unlike its predecessor, however, the Thompson Memorandum was binding on all federal prosecutors." *Stein I*, 435 F. Supp. 2d at 338; App. 31 n.25. Apparently to reinforce the pressure he applied on January 10, Shelby sent a copy of the Thompson Memorandum to Williamson. R. 1948-49.

The government's oppressive tactics quickly produced the desired results. Despite the Dynegy Board of Directors' resolution authorizing payment of Alpha-related legal fees to its finance director, Richard Gould, Dynegy sent Gould and his attorney a letter on March 6, 2003, advising them that Dynegy

would cease paying such fees as of March 31. R. 2989. On May 5, 2003, Dynegy sent a similar letter to former employee Helen Sharkey – who also had been promised funding by the Board – informing Sharkey and her attorney that Dynegy would no longer reimburse costs and fees associated with the criminal investigation. R. 2991-92. Williamson testified that Dynegy probably cut off Sharkey's reimbursement because the USAO discovered that Dynegy was still paying her fees and put pressure on Dynegy. R. 1975-76.

Olis, Sharkey and Gene Foster were indicted on June 10, 2003. App. 2, 25-26. Olis hired criminal counsel Terry Yates on June 20, 2003. App. 27. In July 2003, USAO attorneys called Dynegy's outside criminal counsel, Larry Finder. App. 35. The government had learned that Dynegy was still paying Olis' defense costs, and demanded to know why. App. 35. Finder informed the government that Dynegy had reached an undertaking agreement with Olis. R. 2874. The government attorneys were not impressed by this contractual obligation. They asked whether state law required Dynegy to advance fees to Olis. R. 2875. They told Finder to get them the operative state statute, and he faxed it to them. App. 35. A few days later, the government attorneys called Finder back and told him they did not believe state law required Dynegy to reimburse Olis' fees. App. 35-36. Finder reported this conversation to Williamson. App. 36.

The government and Dynegy then together hatched a plan to cut off Olis' fees, concocting a patently frivolous rationalization: that under the advancement provisions in the company's articles of incorporation, Dynegy was entitled to "advance" Olis' fees into an escrow account and leave the money there until the Board determined whether Olis met the standards for indemnification – in other words, until after Olis' trial. App. 36; R. 1836-38, 1979-80. This bogus interpretation of Dynegy Inc.'s articles of incorporation ignored the fact that the articles specifically required payment of funds "in advance" of the disposition of the legal action – not mere indemnification. R. 2940, 2955. It also ignored the fact that, even leaving the articles aside, Dynegy had incurred contractual obligations to advance defense funds to Olis. App. 5, 27-28; *see also* R. 1631-34.

Plainly, the true reason for Dynegy's legally unsupportable decision to escrow Olis' funds had nothing to do with its interpretation of contracts. Rather, the decision was designed to appease the government. At the civil trial, Williamson testified:

> [T]here was communications going on between the litigation team at Dynegy and the investigative team of the FBI and Department of Justice, and they were not happy that we were continuing to provide financial support when the Thompson memo said the companies cooperating should not provide financial support. So the decision was made to escrow the funds because that was the most

> that we could do to get as close to the standard of cooperation under the Thompson memo, which was provided by the Department of Justice. It was the standards of cooperation.

R. 2086-87.

In fact, the government worked directly with Dynegy to cause it to withhold funds from Olis. A series of emails between Williamson and Shelby demonstrates the extent of the government's interference:

> • On July 18, 2003, Williamson wrote to Shelby: "Larry [Finder] and I talked and I wanted to let you know directly that I am totally supportive of trying to modify our legal support posture. I have wanted to do so for some time. Larry can get you more details but I think we have a workable game plan to further support your efforts." R. 2999. Williamson testified that "modify our legal support posture" meant putting Olis' defense funds into escrow. R. 2056.
>
> • Shelby replied on July 19: "Thanks for looking into this. I think it in neither of our interests to have the company pay for the defense of individuals whose actions were so egregious." R. 2999.
>
> • Later on July 19, Williamson wrote Shelby: "I just reviewed and approved a board resolution to change the process. Seems odd to me it takes a bOD resolution but oh well, I have a telephonic BOD meeting this week for

> some of the financing matters so we will add this to the agenda (s/b Wednesday) and then notify Olis and Foster Attorneys. I am no paying for Sharkey as it is so this impact is to Foster and Olis." R. 3001.

On July 23, 2003, Dynegy's Board of Directors adopted the resolution approved by Williamson. The resolution stated, in part:

> the Board directs all future advancements of authorized reasonable expenses (including attorney's fees) incurred by Foster and Olis in defending the [Project Alpha indictment] be remitted by Dynegy to [an] escrow account or accounts upon the establishment of said account(s); and
>
> IT IS FURTHER RESOLVED, that funds deposited in said escrow account or accounts established in accordance with this Resolution shall remain on deposit in said account(s) until the Board makes its determination, pursuant to ISCA Section 8.75(a), whether or not Olis and Foster, respectively, acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of Dynegy and had no reasonable cause to believe that his conduct was unlawful.

App. 36; R. 3003-06. Finder emailed a copy of the resolution to Shelby, copying Williamson, and Williamson replied: "Larry: thanks for sending. [¶] Michael: hope this helps." App. 36; R. 3003. Williamson testified that he directed Finder to share the

resolution with the USAO "[a]s a show of good faith that we were trying to get as close to the standard of cooperation under the Thompson memo as we could." R. 2087.

On August 13, 2003, Dynegy notified Olis of its plan to escrow funds until the Board of Directors could make its determination to continue advancements. App. 30; R. 3017-18. Dynegy stated that it would pay the costs Olis accrued through August 18, 2003. App. 30; R. 3017-18. However, after paying an initial $14,000 bill for Yates' June work, Dynegy paid no more funds before the trial, which commenced in November 2003. R. 2316-17, 2363, 3020-26. Dynegy next paid a bill a week *after* the trial concluded, and never paid almost $450,000 in attorney fees and expenses incurred after August 18, 2003. App. 32-34; R. 2317-18, 2354-57, 3028-39.

Olis claimed in his § 2255 motion that the USAO's interference with defense funding was prejudicial for two reasons. First, he asserted that prejudice must be presumed because the USAO's conduct violated Olis' Sixth Amendment right to counsel in a manner that is "structural," and therefore "complete irrespective of the quality of the representation" Olis received. App. 52-53; R. 1650-51 (citing *Stein I*, 435 F. Supp. 2d at 369). Second, Olis claimed numerous examples of particularized prejudice that arose from the lack of defense funding. This prejudice included Olis' inability to hire vital expert witnesses. App. 53; R. 1651-67.

C. The District Court's Denial of the § 2255 Motion and a Certificate of Appealability

The district court denied Olis' § 2255 motion without conducting a hearing. App. 17-18, 108. In its 81-page opinion, the district court denied Olis' ineffective-assistance claims regarding the erroneous jury instructions. App. 92-104. With respect to Olis' argument that the court erroneously instructed the jury that a "scheme to defraud" under the mail and wire fraud statutes requires proof that the defendant sought to *deprive* someone of property – rather than to *obtain* that property – the court found no error. App. 97-104. With respect to Olis' argument that the court erroneously instructed the jurors concerning the wire fraud charges that "[i]t is not necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent," the court agreed that the instruction was erroneous under *Parr v. United States*, 363 U.S. 370, 390-91 (1960). App. 92-94. However, the court found that the error did not prejudice Olis because the wired SEC statements were false and fraudulent due to the alleged conspirators' concealment from Arthur Andersen of the outside hedges and tear-up agreements. App. 94-97.

The district court also denied Olis' interference-with-funding claim, holding that Olis did not demonstrate prejudice arising from the constitutional violation, and thus that the claim was both procedurally barred and substantively unpersuasive. App. 36-57. The court held, among other findings, that the constitutional deprivations about which Olis complained

were not "structural" in nature, and thus that the court need not presume that Olis was prejudiced by the errors. App. 52-53.

In its order denying Olis' petition, the district court also *sua sponte* denied a certificate of appealability. App. 107-08.

D. The Court of Appeals' Decision Denying a Certificate of Appealability

Olis sought a certificate of appealability from the Fifth Circuit. That court denied a certificate in a single-judge order. App. 1-16. The Fifth Circuit found Olis' ineffective-assistance claims insufficient. App. 12-14. It held that the district court's wire and mail fraud instructions using the word "deprive" rather than "obtain" were correct, stating simply that the instructions "repeated the Fifth Circuit's pattern jury instruction for mail and wire fraud, and Olis failed to point to any authority undermining this instruction." App. 14.[2] With respect to Olis' argument that the district court erroneously instructed the jurors concerning the wire fraud charges that "[i]t is not necessary for the government to prove . . . that the material transmitted by wire was itself false or

---

[2] As we will discuss, this statement ignored Olis' citation to several decisions from other Circuits that expressly hold that a wire or mail fraud conviction requires proof that the defendant sought to *obtain* money or property from the victim of the alleged scheme. R. 1697-98, 4213-14.

fraudulent," the Fifth Circuit agreed with the district court that Olis had demonstrated no prejudice because Dynegy's "auditors would have required the cash flows to be characterized as derived from financing." App. 13. The court likewise found that Olis' interference-with-funding claim was procedurally barred because Olis did not demonstrate prejudice. App. 5-7. The court did not address the issue of structural error or presumed prejudice.

Olis moved for panel reconsideration of the single judge's order, but the panel denied Olis' request on September 14, 2009. App. 109.

REASONS FOR GRANTING THE PETITION

This case raises several issues that demand the Court's attention. First, the Fifth Circuit denied Olis a certificate of appealability concerning his claim that the district court erroneously instructed the jury that mail and wire fraud may be demonstrated by proof that the defendant merely sought to *deprive* victims of – rather than *obtain* from them – money or property. That decision conflicts with the decisions of numerous other federal courts, which have held that the mail and wire fraud statutes require proof of a scheme to obtain property from the victims of the scheme. The Fifth Circuit's order continues a disturbing trend pursuant to which the federal courts have

expanded the reach of the mail and wire fraud statutes beyond their plain language and intended scope.

Second, the Fifth Circuit denied Olis a certificate of appealability concerning his claim that his trial counsel was ineffective in failing to object to the instruction that "[i]t is not necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent." The district court conceded that this instruction was erroneous under *Parr*, 363 U.S. at 390-91, and the Court of Appeals assumed that counsel was erroneous for failing to object. But the Fifth Circuit ruled that Olis failed to show prejudice because the SEC filings at issue would not have been approved by Dynegy's auditors if Olis and his alleged coconspirators had not concealed the outside hedges and tear-up agreements. That holding raises an important issue concerning the application of this Court's rulings: *Parr* appears to hold that a mail or wire fraud conviction may rest upon a statement that is required by law to be mailed or wired *only* if the mailed or wired statement was *itself* false or fraudulent. *Id.* at 390-91. But the Fifth Circuit's order is based upon the premise that fraudulent activity aimed at generating a wired communication is sufficient under *Parr* even if the government does not identify anything in the communication itself that is substantively inaccurate. The Court of Appeals' holding renders the *Parr* limitation on mail and wire fraud liability essentially nugatory, and thereby implicitly joins the minority of Circuits that

apply an inappropriately restrictive construction of *Parr*.

Third, the Fifth Circuit denied a certificate of appealability regarding Olis' interference-with-funding claim. Neither the district court nor the court of appeals took issue with the factual basis for the claim – that the USAO purposefully caused Dynegy to withhold funding it was obligated to provide to Olis. Instead, the courts each held that Olis could not show prejudice. But this raises the important question whether the constitutional error at issue requires a showing of particularized prejudice, or whether, instead, the error is structural and prejudice must be presumed, as another district court held in *United States v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006).

Fourth, and finally, this case raises an issue concerning the standard for granting a certificate of appealability under 28 U.S.C. § 2253. Although the Fifth Circuit intoned the proper standard under this Court's jurisprudence, it ignored the actual import of the Court's teachings. The issues identified above are, at the very least, close questions. Indeed, with respect to each issue, we will discuss cases from other Circuits that *affirmatively disagree* with the Fifth Circuit's conclusions. Given those circumstances, it readily follows that reasonable jurists might find Olis' claims to be persuasive. Thus, the Fifth Circuit's decision denying a certificate of appealability cannot be reconciled with the decisions of this Court.

I. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT CONCERNING THE "SCHEME TO DEFRAUD" ELEMENT OF MAIL AND WIRE FRAUD

The mail and wire fraud statutes proscribe "any scheme or artifice to defraud, or for *obtaining* money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343 (emphasis added). Yet the district court instructed the jury that for purposes of these statutes, "scheme to defraud" means "any scheme to *deprive* another of money or property." App. 14 (emphasis added). Olis claimed in his § 2255 motion that the district court's instruction was erroneous, and that his trial counsel was ineffective for failing to object. App. 14. The Fifth Circuit denied a certificate of appealability on the ground that the instruction was correct, App. 14, but its decision conflicts with the holdings of other Circuits.

Despite the disjunctive "or" between the phrases "scheme or artifice to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," this Court twice has held – based on the history of the mail and wire fraud statutes and the meaning of the term "defraud" – that the phrases are to be read together as defining a single offense. *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000); *McNally v. United States*, 483 U.S. 350, 358-59 (1987). Yet in this case,

the jury instructions improperly deleted the "obtaining" element and permitted the jury to convict by finding a scheme simply to deprive another of property. Other courts have condemned that result.

The Sixth Circuit considered the question in *United States v. Baldinger*, 838 F.2d 176 (6th Cir. 1988). There the court was asked "to decide whether letters mailed to customers of appellant's business associate falsely and maliciously stating that his associate was conducting polygraph examinations without a license constituted a 'scheme or artifice to defraud' within the mail fraud statute, 18 U.S.C. § 1341." *Id.* at 177. The court held that § 1341 "was intended by the Congress only to reach schemes 'that have as their goal the transfer of something of economic value *to the defendant*.'" *Id.* at 180 (emphasis added; quoting Comment, *The Intangible Rights Doctrine and Political-Corruption Prosecutions Under the Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 566 (1980)). Accordingly, the court reversed the appellant's conviction because the trial court's instructions did not leave room for the defense that the appellant's acts were motivated by a desire for revenge rather than personal gain. *Id.* at 181.

The Seventh Circuit joined the Sixth in *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). The *Walters* court confronted a case in which the defendant was an agent for college athletes. *Id.* at 1221. He entered into contracts with the athletes in violation of NCAA rules, and then hid the contracts, allegedly "causing . . . universities to pay scholarship funds to

athletes who had become ineligible as a result of the agency contracts." *Id.* The Seventh Circuit observed that "the universities lost property by reason of Walters' deed," but that the losses "were not out of pocket *to Walters*; he planned to profit by taking a percentage of the players' professional incomes." *Id.* at 1224 (emphasis in original). The court determined that Walters was not guilty of mail fraud under these facts:

> Both the "scheme or artifice to defraud" clause and the "obtaining money or property" clause of § 1343 contemplate a transfer of some kind. Accordingly, . . . *we hold that only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud.* Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement.

Id. at 1227 (emphasis added).

The Ninth Circuit has reached a similar conclusion. In *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989), the court stated:

> While it is true that after *McNally* the elements of mail fraud remain unchanged except that the intent of the scheme must be to obtain money or property, the [Supreme] Court made it clear that the intent must be to obtain money or property from the one who is deceived: "the words 'to defraud'

> commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'"

Id. at 221 (quoting *McNally*, 483 U.S. at 358). Following *Lew*, the Ninth Circuit again considered the issue in *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel Employees, Rest. Employees*, 215 F.3d 923 (9th Cir. 2000). There the court confronted a civil RICO suit by a hotel against a union; the suit alleged that the union committed violations of 18 U.S.C. §§ 1341 and 1343 by defrauding the hotel of customer goodwill. *Id.* at 924-26. The Ninth Circuit found that the complaint was properly dismissed because "the mail and wire fraud statutes, §§ 1341 and 1343, prohibit use of the mails and wires to *obtain* money or property *from the one who is deceived.*" *Id.* at 926 (emphasis in original). "[A]ccepting the business usage that a hotel's goodwill can be, for some purposes, a recognized property right, the Hotel has failed to prove that the Union sought to *obtain* that property through deceptive means." *Id.* (emphasis in original).

In opposition to the above cases are the Fifth Circuit's holding in this case and jurisprudence from two other Circuits. In *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004), the Third Circuit affirmed its prior holding that the mail and wire fraud statutes do not require that the defendant seek to obtain the victim's property for himself. *Id.* at 602. The Second Circuit's holding in *Porcelli v. United States*, 404 F.3d

157 (2d Cir. 2005), was somewhat more ambiguous, but that case arguably stands for the same proposition. *See id.* at 162.

Accordingly, the Circuits are split on this question. The Fifth Circuit's blithe assertion that the district court's instructions "repeated the Fifth Circuit's pattern jury instruction for mail and wire fraud, and Olis failed to point to any authority undermining this instruction," App. 14, completely ignored the contrary holdings of the Sixth, Seventh and Ninth Circuits, which Olis had cited in his briefs. *See* R. 1697-98, 4213-14.

Olis respectfully submits that this petition presents a recurring question that has yielded a deep divide among the Circuits. Moreover, the question becomes increasingly vital as the government more frequently seeks to prosecute under sections 1341 and 1343 corporate employees for their actions taken on behalf of and intended to benefit their employers. Indeed, the issue raised herein is closely connected to an issue that has already attracted the attention of this Court. This term, the Court has granted review in three separate cases that test the scope of 18 U.S.C. § 1346, which prohibits so-called "honest services fraud." *See Skilling v. United States*, No. 08-1394, 130 S. Ct. 393 (2009); *Weyhrauch v. United States*, 08-1196, 129 S. Ct. 2863 (2009); *Black, et al. v. United States*, No. 08-876, 129 S. Ct. 2379 (2009); *see also Sorich, et al. v. United States*, No. 08-410, 129 S. Ct. 1308, 1311 (2009) (Scalia, J. dissenting from denial of certiorari: "In light of the conflicts among

the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality of § 1346. Indeed, it seems to me quite irresponsible to let the current chaos prevail."). The Circuit split concerning the proper construction of sections 1341 and 1343 presents similarly important concerns: conflict among the courts, the apparent expansion of criminal liability beyond the scope intended by Congress, and resulting chaos. This Court should step in to restore order.

II. THIS COURT SHOULD PROVIDE CLARITY CONCERNING THE *PARR* RULE, AND RESOLVE A CIRCUIT SPLIT ON THE APPLICATION OF THAT CASE

The district court instructed the jury with respect to the wire fraud charges against Olis, "It is not necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent." App. 13. As even the district court subsequently acknowledged, App. 92-94, that instruction was incorrect as a matter of law.

Although the district court's instruction would have been correct in the usual case, this case fell under the so-called "*Parr* exception" to the general rule. In *Parr*, this Court considered a mail fraud charge, observing that the statute prohibits the use of

the mails "for the purpose of executing [a] scheme" to defraud or to obtain money by false representations. 363 U.S. at 389. The Court held that "it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute." *Id.* at 391.[3] Thus, where a wired statement is required by law to be sent, it cannot form the basis of a wire fraud conviction unless the statement itself is false or fraudulent. *United States v. Curry*, 681 F.2d 406, 412 (5th Cir. 1982) ("mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme"), *limited on other grounds as stated in United States v. Herron*, 825 F.2d 50, 55 n.6 (5th Cir. 1987); *see also United States v. Lake*, 472 F.3d 1247, 1256 (10th Cir. 2007) (following *Parr* and *Curry* in the wire fraud context); *United States v. Cross*, 128 F.3d 145, 149-52 (3d Cir. 1997); *United States v. Gray*, 790 F.2d 1290, 1298 (6th Cir. 1986), *rev'd on other grounds sub nom.*, *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979). Here, the wire fraud counts charged a scheme involving Dynegy's filing with the SEC of two Form 10-Qs and one Form

---

[3] Although *Parr* analyzed the mail fraud statute, this Court has taught that because the mail and wire fraud statutes share the same language in relevant part, the same analysis applies to each. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

10-K. App. 92-94. Such filings are required by law. App. 94; *see also* 15 U.S.C. § 15m(a), 17 C.F.R. §§ 240.13a-13, 249.308a, 249.310. Accordingly, under *Parr* and its progeny it *was* "necessary for the government to prove . . . that the material transmitted by wire was itself false or fraudulent," and the instruction to the contrary was incorrect.[4] Olis claimed that his trial counsel was constitutionally ineffective for failing to object to the erroneous instruction.

The courts below did not contest the conclusion that *Parr* rendered the instruction erroneous. App. 13, 94. This Court should be aware, however, that one Circuit has departed from the plain meaning of *Parr* and from the holdings of the other Circuits to consider the issue. *See United States v. Green*, 786 F.2d 247, 249-51 (7th Cir. 1986) (finding that this Court did not hold in *Parr* that legally-required mailings must be false or fraudulent in order to support a mail fraud conviction); *but compare Lake*, 472 F.3d at 1256 (citing numerous cases from other Circuits and stating: "Not only did the *Green* majority opinion adopt an unconvincingly crabbed interpretation of *Parr*, but it failed to explain how a nonmisleading mailing

---

[4] In *Schmuck v. United States*, 489 U.S. 705 (1989), the Court reaffirmed the principle of *Parr*, but added a limitation not relevant here: "[T]he *Parr* exception is . . . inapplicable [when the] mailings would not have been made but for [the defendant's] alleged scheme to defraud." *United States v. Caldwell*, 302 F.3d 399, 416 (5th Cir. 2002) (citing *Schmuck*, 489 U.S. at 713 n.7).

compelled by law can be for the purpose of furthering a fraudulent scheme.").

In any event, the real issue in this case is *how* the *Parr* exception should apply – that is, what is the meaning of the requirement that the wired material itself be false or fraudulent. The district court and court of appeals accepted Olis' contention that the trial instruction was incorrect under *Parr*, but found that there was no prejudice because Olis would have been convicted of wire fraud even under a proper instruction. App. 13, 94-97. Olis had argued that the erroneous instruction was prejudicial because the government made no attempt to prove that the SEC filings were substantively false or contained incorrect accounting. R. 1695-96. The Fifth Circuit ruled, however, that Dynegy's SEC filings were false or fraudulent because Jim Hecker at Arthur Andersen would not have approved the filings had he known of the outside hedges and tear-up agreements that the defendants allegedly hid. App. 13.

The lower courts' rulings so limit the *Parr* exception as to render it essentially nugatory. The very point of the *Parr* exception is that fraudulent activity does not invariably fall under the purview of the mail and wire fraud statutes. Thus, under *Parr*, a fraudulent scheme that employs a mailing or wire that is required by law and that is not itself false may still constitute a *fraud*, but it does not constitute *mail or wire fraud* under federal law. Yet the Fifth Circuit's reading in this case would permit a conviction where the defendants allegedly used fraudulent means to

convince Arthur Andersen to approve SEC filings even though there was no proof that the filings were in any way false or based on incorrect accounting. In this respect, the Fifth Circuit departed from the approach of the vast majority of courts to consider *Parr*, and joined the lone Seventh Circuit's "crabbed" reading of that case.

This Court should grant certiorari to clarify the holding in *Parr* and to resolve the Circuit split regarding the scope of the exception created by that decision.

III. THIS COURT SHOULD RESOLVE THE VITAL QUESTION WHETHER THE GOVERNMENT'S INTENTIONAL INTERFERENCE WITH A DEFENDANT'S DEFENSE FUNDING WORKS A "STRUCTURAL" CONSTITUTIONAL ERROR THAT REQUIRES NO PARTICULARIZED SHOWING OF PREJUDICE

As discussed in the Statement of the Case, *supra*, Olis claimed in his § 2255 motion that the USAO intentionally caused Dynegy to withhold from Olis defense funding that the company was legally obligated to provide. App. 4-5, 37-38; *see also* R. 1629-67. The Fifth Circuit denied a certificate of appealability on this claim, agreeing with the district court that Olis failed to show prejudice arising from the deprivation of funding. App. 57. That holding raises an important question about this egregious sort of government meddling: does the interference work a

structural error such that a court must presume prejudice?

The framework for Olis' claim was established in the recent case of *United States v. Stein*. *Stein* concerned the prosecution of eighteen defendants, most of them former employees or partners of the accounting giant KPMG, on conspiracy and tax evasion charges. The district court found that KPMG would have paid the KPMG defendants' legal fees, but that the USAO employed the threat of indicting KPMG to coerce the company into cutting off funding. *United States v. Stein*, 435 F. Supp. 2d 330, 336-53 (S.D.N.Y. 2006) ("*Stein I*"); *United States v. Stein*, 495 F. Supp. 2d 390, 393-409 (S.D.N.Y. 2007) ("*Stein IV*"). Holding that the USAO's conduct violated the KPMG defendants' substantive due process and Sixth Amendment rights, the district court dismissed the indictment against the defendants who suffered the violations. *Stein IV*, 495 F. Supp. 2d at 427-28. The Second Circuit affirmed the dismissal. 541 F.3d 130 (2d Cir. 2008).

The *Stein* district court ruled that the constitutional violation at issue here is analogous to that at issue in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where this Court considered a violation of the defendant's Sixth Amendment right to counsel of choice. *See Stein I*, 435 F. Supp. 2d at 369. The *Gonzalez-Lopez* Court held:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from

> being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

548 U.S. at 148. As the court explained in *Stein*, "[t]he government has interfered with [Olis'] right to be represented as [he] choose[s], subject to the constraints imposed by the resources lawfully available to [hi]m. This violation, like a deprivation of the right to counsel of [his] choice, is complete irrespective of the quality of the representation" Olis received. *Stein I*, 435 F. Supp. 2d at 369.

Put differently, the Sixth Amendment errors that infected Olis' trial were "structural errors." *Id.* at 370-72. Structural errors have "consequences that are necessarily unquantifiable and indeterminate" and "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Gonzalez-Lopez*, 548 U.S. at 148, 150 (quotation marks and alterations omitted). As this Court has recognized, a structural error arises in circumstances where the government "interfere[s] with counsel's assistance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984)). For such

errors, prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Id.* Olis contended that the USAO's misconduct worked a structural error because it interfered with his defense counsel's ability to defend him. Although it is impossible to completely reconstruct how Olis might have conducted his defense had he received full funding from Dynegy, it is certain that the funds would have enabled Olis' counsel to better prepare for the unusually complex trial in this matter. App. 52-53; R. 1650-51.[5] The Sixth Amendment violations were thus prejudicial because the government's misconduct affected the "framework within which the trial proceed[ed]." *Gonzalez-Lopez*, 548 U.S. at 148.[6]

The district court briefly considered the question of presumed prejudice, but found in contrast to *Stein* that the asserted constitutional deprivations were not subject to structural error analysis. App. 52-53. The Fifth Circuit did not even address the question. It is

---

[5] Olis presented evidence that, with sufficient funding from Dynegy, he would have been able to – among other steps – present expert testimony contradicting the unrebutted testimony of a prosecution witness that the University of California pension fund sustained millions of dollars of losses as a direct result of the scheme related to Project Alpha. R. 1651-67, 4173-81; *see also* R. 1452-55, 1565-86, 1705-92.

[6] The Second Circuit, in affirming the district court's decision in *Stein*, did not directly address the question whether a claimant must show particularized prejudice when a case goes to verdict before discovery of the government's unconstitutional interference with defense funding. *See* 541 F.3d at 157 & n.15.

an issue that may recur because the USAO's "Thompson Memorandum" once encouraged this type of government misconduct. This Court should grant certiorari to consider this species of constitutional wrong, and to flesh out the jurisprudence concerning structural error for Sixth Amendment violations.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE PROPER STANDARD FOR DETERMINING WHETHER TO GRANT A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. § 2253

The final issue for this Court's consideration is vitally important because it arises on a constant basis in the lower federal courts, but this Court will rarely have occasion to review it. This case originated as a § 2255 motion in the Southern District of Texas. That court denied the motion and, on its own motion, denied a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253. App. 107-08. The Fifth Circuit likewise denied a COA on all issues. App. 1-16. But the lower courts were plainly employing the wrong standard in considering Olis' requests for a COA.

28 U.S.C. § 2253(c) requires an applicant for relief under § 2255 to seek a COA from the district or circuit court before appealing a decision denying the motion. Section 2253(c)(2) provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." To give guidance to the lower

courts, this Court has interpreted that vague standard. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court construed § 2253, relying in part on its previous decision in *Slack v. McDaniel*, 529 U.S. 473 (2000):

> a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief . . . . [¶]. . . . "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

Miller-El, 537 U.S. 337-38 (quoting *Slack*, 529 U.S. at 484); *see also id.* at 342, 348 (stating that the question on a COA application is whether the district court's determination is "debatable").

But despite giving lip service to the "reasonable jurists" standard set forth in *Miller-El*, App. 3-4, the Fifth Circuit flagrantly failed to apply it. As discussed above, Olis' § 2255 motion raised several important legal questions. With respect to each question discussed in this petition, the Fifth Circuit's adjudication conflicts with the decisions of one or more other federal courts. When other courts, including other

circuit courts of appeals, have issued decisions disagreeing with a district court's rulings, there can be no question that "reasonable jurists" could find those issues "debatable." Indeed, as discussed, the Fifth Circuit's reasoning on some of the issues raised herein places it squarely in the minority, with the implicit suggestion that the majority position is not only wrong but not even worthy of debate. Clearly, the Fifth Circuit failed to apply the appropriate standard for issuance of a certificate of appealability.

This Court should grant certiorari in order to clarify and re-emphasize the standard for granting a COA under § 2253.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

TED W. CASSMAN
RAPHAEL M. GOLDMAN
ARGUEDAS, CASSMAN & HEADLEY, LLP
803 Hearst Avenue
Berkeley, CA 94710

Counsel for Petitioner Jamie Olis

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20836
USDC No. H-07-3295
USDC No. H-03-217-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMIE OLIS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Aug. 13, 2009)

ORDER:

Defendant-appellant Jamie Olis's 28 U.S.C. § 2255 motion was denied by the district court. The district court also denied a certificate of appealability ("COA") for each of the issues that Olis raised in his motion. Now, Olis seeks from this court a COA, which we deny for each claim for the following reasons.

I. BACKGROUND

Olis, a federal prisoner, was convicted on November 13, 2003, on all counts charged in a June 10, 2003 indictment. The indictment alleged that Olis – an executive at Dynegy Corporation ("Dynegy") – and two other Dynegy executives, Gene Foster and Helen Sharkey, committed securities fraud, mail fraud, wire fraud, and conspiracy to commit securities fraud, mail fraud, and wire fraud. The charges stemmed from the defendants' participation in "Project Alpha," a complex deal involving natural gas transactions from 2001 to 2005. As we have earlier described it, "Project Alpha was a plan to borrow $300 million and make it appear to the outside world (and in particular to Dynegy's auditor Arthur Andersen) as if the money was generated by Dynegy's business operations." *United States v. Olis,* 429 F.3d 540, 541 (5th Cir. 2005). To ensure the accounting characterization of Project Alpha as cash from operations, Olis, Foster, and Sharkey intentionally concealed from Jim Heck – the Arthur Andersen partner responsible for signing off on Dynegy's SEC statements – various hedge and tear-up agreements that otherwise would have required characterizing the cash as derived from "financing." After an investigation, however, the Securities and Exchange Commission ("SEC") on April 25, 2002, required Dynegy to restate Project Alpha's cash flow as derived from financing instead of from operations. As a result, Dynegy was seen as borrowing the money

generated from Project Alpha, which adversely affected the company's stock price.[1]

While Foster and Sharkey pleaded guilty to all charges, Olis pleaded not guilty and was tried. The trial began on November 3, 2003, and concluded on November 13, 2003, with the jury convicting Olis on all counts. Olis appealed, and we affirmed his conviction on October 31, 2005. Olis then filed a 28 U.S.C. § 2255 motion with the district court. In the motion, Olis raised five issues, and the district court denied Olis's motion on all of these issues. The district court also declined to issue a COA for each of the issues. Olis now seeks from this court a COA on all of the issues that he raised in the district court.

II. STANDARD OF REVIEW

A defendant must obtain a COA to appeal a final order in proceedings under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B). "To obtain a COA, [the petitioner] must make a 'substantial showing of the denial of a constitutional right.'" *United States v. Webster,* 392 F.3d 787, 791 (5th Cir. 2004) (quoting 28 U.S.C. § 2253(c)(2)). To make such a substantial showing, the petitioner "must demonstrate that

---

[1] A thorough account of the facts may be found in our opinion affirming Olis's conviction, *Olis,* 429 F.3d at 540, and in the district court's opinion denying Olis's § 2255 motion, *United States v. Olis*, H-07-3295, 2008 WL 5046342 (S.D. Tex. Nov. 21, 2008).

'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003)).

III. DISCUSSION

In his § 2255 motion, Olis argued: (1) that the Government interfered with his access to funds used to pay his defense counsel, thus violating his right to present the defense of his choice; (2) that he was rendered ineffective assistance of counsel by his trial attorney's failure to object to the Government's alleged constructive amendment of the indictment; (3) that he was rendered ineffective assistance of counsel by his trial attorney's failure to object to the inclusion of a biased juror on the petit jury and, relatedly, to the violation of Olis's right to have his counsel present at all critical stages of the proceedings; (4) that he was rendered ineffective assistance of counsel by his trial attorney's failure to object to, and appeal from, the jury instructions concerning the mail and wire fraud counts; and (5) that he was rendered ineffective assistance because his counsel failed to properly prepare a defense. Now, he asserts that reasonable jurists would find debatable the district court's denial of relief on these claims. We address each claim in turn.

A. Interference With Olis's Ability To Present The Defense Of His Choice

Olis first argues that the Government interfered with his right to present the defense of his choice in violation of the Fifth and Sixth Amendments. Dynegy had agreed to pay for his defense counsel, and he claims that Dynegy stopped paying for his counsel after the Government threatened to indict Dynegy. Olis contends that, had the Government not intervened, he would have presented a different and more effective defense at trial. In response, the Government urged in the district court that Olis's claim was procedurally barred because he did not raise this argument on direct appeal.

A petitioner's claim will be procedurally barred if he had the opportunity to raise the issue in a direct appeal from his conviction and failed to do so. *United States v. Guerra,* 94 F.3d 989, 993 (5th Cir. 1996). "To overcome the bar, a defendant must show both 'cause' for failing to raise the issue on direct appeal and 'actual prejudice' flowing from the errors alleged." *Id.* The district court determined that although Olis sufficiently demonstrated cause, he failed to show that the alleged error prejudiced him. In seeking a COA, Olis argues that he was prejudiced.

Prejudice is shown when the petitioner "demonstrates that, but for the error, he might not have been convicted." *Id.* at 994. Olis hired attorney Terry Yates on June 20, 2003. Dynegy originally agreed to advance the payment of Yates's legal fees, but in an

August 13, 2003 letter, it informed Yates that it would instead deposit all payments into an escrow account effective August 18, 2003. This change in payment policy was a result of a conversation between the prosecutors and Dynegy's outside counsel in which the prosecutors questioned whether the corporation was obligated to advance the fee payments. Yates discovered the fact of this conversation in the course of conducting discovery during his June 2005 state action seeking payment from Dynegy of his outstanding legal fees. Although Yates had not obtained payment of the fees placed into escrow, he stated that he did not suspect Dynegy would attempt to deny payment until March 2004. Further, Yates sent three bills to Dynegy for work he performed prior to August 18, 2003, and the latest of these bills was sent in December 2003 – after the conclusion of Olis's November trial. Dynegy advanced payment for all of these bills in full. Olis now claims that had the prosecutors not pressured Dynegy to stop advancing fee payments, he would have hired additional experts to discredit the prosecution's witnesses. He also asserts that "Yates realized from Dynegy's behavior that he would not receive funds from the company before trial to pay for experts and other such costs, and these facts undermined the conduct of Olis's defense." The facts do not support Olis's assertions, however; he has failed to show "that the defense presented at his trial was anything other than the defense he chose to present and would have presented even if the government had not pressured Dynegy to stop advancing funds to his attorneys." *Olis,* 2008 WL

5046342, at *13. Thus, reasonable jurists would not debate the district court's determination that Olis was not prejudiced.

B. Ineffective Assistance Of Counsel Claims

Olis's remaining issues all raise ineffective assistance of counsel claims. These claims are governed by the familiar *Strickland* standard: Olis must first show that his trial counsel's performance fell below an objective standard of reasonableness; then, he must show that he was prejudiced by his trial counsel's unreasonable performance. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

1. Failure To Object To Constructive Amendment Of Indictment

Olis asserts that he was rendered ineffective assistance because his trial counsel failed to object to the constructive amendment of the indictment.[2] The district court determined that Olis's counsel's performance was not objectively unreasonable because

---

[2] Notably, Olis separately seeks a COA on whether the Government constructively amended the indictment; however, in his § 2255 motion, he argued only that his counsel had failed to object to the alleged constructive amendment. Even were this issue considered separately, the COA would be denied because, as the following review of whether Olis's counsel's conduct was objectively unreasonable shows, the district court's determination that the indictment was not constructively amended would not be debatable.

the indictment was not constructively amended, and reasonable jurists would not debate that conclusion.

A constructive amendment may occur when the government "obtain[s] an indictment alleging certain material elements or facts of the crime, then seek[s] a conviction on the basis of a different set of elements or facts." *United States v. Robles-Vertiz,* 155 F.3d 725, 728 (5th Cir. 1998). According to Olis, the Government constructively amended the indictment because the indictment alleged that Olis, Foster, and Sharkey knew, intended, and believed that Project Alpha was, in fact, a loan that should have been disclosed as cash flows from financing activities and that they falsely reported to rating agencies, lenders, market and securities analysts, and the investing public that the cash flows were operating income rather than financing activities. But, at trial, the Government did not seek to prove that the purpose of Project Alpha was to falsely characterize loan proceeds as cash flow from operations. Instead, the Government focused only on showing that Olis concealed outside hedge and tear-up agreements from Dynegy's auditors.

Olis's argument is unavailing. It ignores that the Government intended to show that the defendants knew that the auditors would not sign off on characterizing Project Alpha's cash flows as coming from operations if they were aware of the hedge and tear-up agreements. Thus, the Government sought to prove that the method by which Olis falsely reported the project's cash flow was by intentionally concealing these details from the auditors. The indictment plainly lays

out this theory. It alleges that "Dynegy's auditors had warned that either a 100% hedging strategy or 'tear up' language would prevent Dynegy from reporting the cash flow from the Project Alpha natural gas contract as cash flows from risk-management activities in its publicly-filed financial statements," and that, despite this knowledge, the defendants "did intentionally conceal from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging strategy and the 'tear up' language." As a result, "the [d]efendants . . . , knew and intended that Dynegy would and did falsely report to the SEC . . . by means of electronic filing of Quarterly Reports ("Forms 10-Q") and an Annual Report ("Form 10-K"), that approximately $300,000,000 of 'cash flows from financing activities' were 'cash flows from operating activities.'" Because the evidence adduced at trial proved the facts alleged in the indictment, *see Olis*, 429 F.3d at 543 (stating that "[a] reasonable jury . . . could easily have found Olis guilty beyond a reasonable doubt" in denying Olis's sufficiency of the evidence claim on direct appeal), the Government did not constructively amend the indictment. Thus, reasonable jurists would not debate the district court's determination, and we therefore deny a COA.

2. Failure To Object To Inclusion Of A Biased Juror

Next, Olis claims that he was rendered ineffective assistance because his trial counsel did not object to the inclusion of a biased juror on the petit jury and did not object when the judge talked with the juror ex parte.

After the first day of trial, one of the jurors told the district court that the trial schedule interfered with the juror's obligation to pick up her daughter from school. The court met with the juror and believed that the problem had been remedied; however, it received a note from the juror on the next day stating:

> I am sorry to inform you that I will not be able to judge this case fairly, knowing that my boss will not pay me for missed days and how my child will be getting home from school, because my income is the main source for my household. So, it is not fair for all that I remain on the jury. So, I am asking you to please dismiss me from the case.

In a side-bar conference, the court suggested to both side's counsel that the juror's income-related concerns could be addressed by ensuring that she was paid the jury stipend on a weekly basis and that the court should present this solution to the juror. Counsel, for both sides agreed. The court later reported that the juror was not happy with the outcome, but she remained on the panel through the verdict.

First, Olis quotes only the portion of the juror's statement that "I will not be able to judge this case fairly" and asserts that this express statement presumptively establishes the juror's bias. The district court, however, determined from the context of the juror's statement that she was not actually biased against Olis. *See Suarez v. Bennett,* 171 F. App'x 361, 363 (2d Cir. 2006) (concluding that a retained juror was not biased when he had a family obligation on the evening of deliberations). In light of the record, reasonable jurists would not debate the district court's conclusion. Olis relies on *Hughes v. United States,* 258 F.3d 453 (6th Cir. 2001), to assert that bias must be presumed from the juror's statement. But in that case, the court looked only to the juror's express statement because neither the court nor the parties attempted to determine whether the juror could base her verdict on the evidence presented. *See Hughes,* 258 F.3d at 459 ("Significantly absent from this case is any attempt, by counsel or the court, to rehabilitate juror Orman to establish record support for the claim that Orman was able to cast aside her opinion and render a verdict based on the evidence presented in court."). Here, the court clearly addressed the basis for the juror's statement, and Olis fails to point to any aspect of the record suggesting that the juror could not make a determination based on the evidence presented. Thus, because the juror was not biased, reasonable jurists would not debate the district court's conclusion that Olis's trial counsel's conduct was not objectively unreasonable.

Second, Olis asserts that his counsel rendered ineffective assistance by failing to object to the judge's meeting with the juror outside the presence of Olis and his attorney. The district court rejected Olis's claim, explaining that counsel's refraining from objection was not unreasonable because Olis's or his counsel's absence did not prevent a fair and just hearing and because "'[t]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right.'" *Olis,* 2008 WL 5046342, at *25 (alteration in original) (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985)); *see also Gagnon*, 470 U.S. at 526 ("The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (quotation marks omitted)). Reasonable jurists would not find this conclusion debatable.

Because reasonable jurists would not debate either of the district court's conclusions surrounding the meeting with the juror, a COA is denied.

3. Failure To Object To And Appeal From Erroneous Jury Instructions

Olis argues he was rendered ineffective assistance by his counsel's failure to object to, and seek appeal from, two of the instructions given to the jury concerning (1) the falsity of the material transmitted by wire and (2) the definition of "scheme to defraud."

a. Falsity Of Material Transmitted By Wire Instruction

First, Olis argues that the he was rendered ineffective assistance by his counsel's failure to object to the district court's instruction with regard to the wire fraud counts, which stated that "[i]t is not necessary that the government prove . . . that the material transmitted by wire was itself false or fraudulent." *Olis,* 2008 WL 5046342, at *26 (quotation marks omitted). Assuming that Olis's counsel unreasonably failed to object to this instruction, the district court rejected Olis's ineffective assistance claim because he failed to show that he was prejudiced in light of the Government's evidence that overwhelmingly proved the allegation that Olis intentionally withheld the hedging and tear-up agreements from Dynegy's auditors in order to characterize Project Alpha's cash flow as derived from operations when he knew that, had the auditors known of such agreements, the auditors would have required the cash flows to be characterized as derived from financing. Reasonable jurists would not debate this determination. *See Olis,* 429 F.3d at 543. ("A reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating emails among, Olis and his co-indictees and a wealth of other evidence, could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes.").

b. Definition Of Scheme To Defraud Instruction

Olis further argues that his counsel was ineffective for not challenging by objection or on appeal the district court's explanation of "scheme to defraud." The district court explained to the jury that "a 'scheme to defraud' includes any scheme to deprive another of money or property by means of a false or fraudulent pretense, representation, or promise." *Olis*, 2008 WL 5046342, at *29. Olis argues this instruction was erroneous because a scheme to defraud must be a scheme "to obtain" money or property and that the Government failed to prove that Olis sought to obtain any money or property. The district court rejected this argument: its instruction repeated the Fifth Circuit's pattern jury instruction for mail and wire fraud, and Olis failed to point to any authority undermining this instruction. Reasonable jurists would not debate this determination. *See United States v. Svete*, 556 F.3d 1157, 1160-61 (11th Cir. 2009) (en banc) (upholding an instruction for mail fraud defining scheme to defraud that did not state that the defendant must seek to obtain money or property); *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008) (approving a mail fraud instruction defining scheme to defraud that was substantially similar to the pattern instruction and that did not state that the defendant must seek to obtain money or property).

4. Failure To Properly Prepare Defense

Finally, Oils claims that his counsel was ineffective for failing to properly prepare his defense. He contends that his counsel should have retained experts, employed additional attorneys, hired an investigator, retained a jury consultant, and obtained a database to search the discovery materials. The district court rejected these broad claims and concluded that Olis's trial counsel's conduct did not fall below the threshold of reasonableness: Olis's counsel urged to the jury that the Government failed to meet its burden of proving Olis's intent to defraud; counsel sought and received an advice-of-counsel jury instruction, claiming that Olis had relied in good faith on advice from attorneys and accountants; and counsel worked to discredit the testimony of the Government's star witnesses through cross-examination. Further, the district court determined that Olis was not prejudiced because none of his proposals would have done "a better job of refuting and/or discrediting the testimony . . . , or would have allowed them to refute any of the incriminating e-mails exchanged with his co-conspirators, some of which the government used to prove the element of intent." *Olis,* 2008 WL 5046342, at *30. In seeking a COA from this court, Olis still fails to explain how his proposed defense strategies would have overcome the evidence supporting his conviction. Hence, reasonable jurists would not disagree with the district court's determination, and a COA is denied.

IV. CONCLUSION

For the above reasons, we DENY a COA on all issues.

/s/ Carolyn Dineen King
CAROLYN DINEEN KING
UNITED STATES
CIRCUIT JUDGE

2008 WL 5046342

United States District Court,
S.D. Texas,
Houston Division.
UNITED STATES of America
v.
Jamie OLIS.
Civil Action No. H-07-3295.
Criminal No. H-03-217-01.

Nov. 21, 2008.

Theodore W. Cassman, Arguedas, Cassman & Headley, LLP, Berkeley, CA, for Jamie Olis.

James L. Turner, US Attorneys Office, Houston, TX, for United States of America.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

Pending before the court are Jamie Olis' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket Entry No. 305), the United States' Answer to Motion to Vacate Pursuant to 28 U.S.C. § 2255, Motion for Summary Denial, and Supporting Memorandum of Law (Docket Entry Nos. 345-346), and Olis' Response to Government's Answer and Motion for Summary Judgment, and Motion for Reconsideration of Olis' Motion for Discovery (Docket Entry No. 349). After careful consideration of the pending motions, the court concludes that Olis' motion to vacate, set

aside, or correct sentence should be denied, the United States' motion for summary denial should be granted, and Olis' motion for reconsideration should be denied.

I. *Procedural Background*

Following his conviction for conspiracy (Count 1), securities fraud (Count 2), mail fraud (Count 3), and wire fraud (Counts 4-6), Olis was sentenced to serve 292 months in prison. On direct appeal Olis challenged the sufficiency of the evidence and the court's application of the Federal Sentencing Guidelines. Rejecting Olis' sufficiency of the evidence argument the Fifth Circuit explained

> Olis contends, almost perfunctorily, that the evidence does not support his conviction. In particular, he disputes the proof that he conspired to conceal two critical features of Project Alpha from Dynegy's outside auditor Arthur Andersen – the "parent level" hedge and the "tear-up" agreements. This court will not disturb a jury's verdict unless the record demonstrates that a rational jury could not have found each of the elements of the offense beyond a reasonable doubt. *United States v. Dahlstrom,* 180 F.3d 677, 684 (5th Cir.1999) . . .
>
> Olis asserts that the evidence demonstrated that everyone working on Project Alpha, including Arthur Andersen accountants, knew that the bank owners of ABG Gas were fully

> hedged against the risk of loss from variable gas prices. Olis's boss, Foster, testified, however, as a star prosecution witness and co-indictee, that he and Olis wrongly agreed to the tear-ups and the parent hedge and hid them from Arthur Andersen. Jim Hecker, an audit partner at Arthur Andersen, testified that he advised Dynegy against tear-ups, and Dynegy subsequently did not reveal this aspect of Project Alpha to him. A reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating emails among Olis and his co-indictees and a wealth of other evidence, could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes.

United States v. Olis, 429 F.3d 540, 542-43 (5th Cir.2005).[1] The Fifth Circuit concluded that "the

---

[1] As recognized by the Fifth Circuit, any doubt that Olis and his co-conspirators knowingly and intentionally conspired to conceal the outside hedges and tear-up agreements from Arthur Andersen and others in an effort to prevent Project Alpha from being fully disclosed was dispelled both by the testimony of co-conspirator Gene Foster and by e-mails circulated among the co-conspirators. Foster testified that the co-conspirators actively sought to prevent documents from the Project Alpha operations manual from being distributed even to other Dynegy employees for fear that they would fall into the hands of Arthur Andersen. See Trial Transcript (T.Tr.) Day 6, Docket Entry No. 103, pp. 209:17-213:20. E-mail messages circulated among the co-conspirators documented the importance of keeping the Project Alpha documents to themselves. In one such e-mail dated May 10, 2001, Olis wrote to his co-defendants, Foster and Helen Sharkey, and to another Dynegy employee who – although not indicted – was alleged to have been a co-conspirator:

(Continued on following page)

> Probably already know this, but huge issue to us, so I'll nag. It is very important that we keep structure charts and other written info to an absolute minimum on this deal. Therefore, please do not forward the attached manual in its entirety to anyone else. Also, to extent that cash management or some other person needs info, should try to recreate the data necessary instead of giving pages from document which are numbered and on Citi headings. Finally, the charts should never, never, never go to anyone.

Id. at 212:4-12, and Govt. Exhibit 681. *See also id.* at 211:11-212:3, explaining when and to whom this e-mail message was sent. Foster testified that because he agreed, he replied: "Nagging is fine." *Id.* at 212:20-213:8 and Govt. Exhibit 681-1. Olis, Sharkey, and another Dynegy employee received a similar email message from Foster concerning the importance of not distributing the Project Alpha operations manual to others:

> It is critical that this document not be distributed. It should be held only by those on this e-mail, as we are the only ones that have complete knowledge of this transaction.

Id. at 213:17-20, and Govt. Exhibit 680. On January 31, 2002, when Dynegy was considering the possibility of executing a second Project Alpha-type transaction, Olis sent the following e-mail message to Foster and to one other alleged but unindicted co-conspirator:

> Please note that someone really needs to kill this transaction. The more I think about it, there is no way that AA [i.e., Arthur Andersen] is going to give us an opinion on this one. Also, I think by doing a second one, we are just jeopardizing Alpha, even if we do not complete . . . the idea that we tried to enter into a separate partnership with ICA just after their term interest expires really reeks and could make me cry at the hands of a good litigator on the witness stand.

T.Tr. Day 7, Docket Entry No. 104, p. 36:8-14, and Govt. Exhibit 833. *See also id.* at 35:21-36:5, explaining when and to whom

(Continued on following page)

conviction is factually supported, but Olis must be resentenced." *Id.* at 541. On September 12-13, 2006, a second sentencing hearing was held and on September 22, 2006, the court issued a Memorandum Opinion (Docket Entry No. 293) pursuant to which Olis was sentenced to serve 60 months in prison as to counts 1, 3, 4, 5 and 6 and 72 months in prison as to count 2 to be served concurrently for a total term of 72 months. On September 25, 2006, an Amended Judgment (Docket Entry No. 294) was entered from which Olis did not appeal.

II. *Standard of Review*

28 U.S.C. § 2255(a) allows

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence.

---

this e-mail message was sent. When asked what he understood Olis to be telling him in this e-mail message, Foster said, "By doing another one [i.e. Project Alpha-type transaction] we were potentially jeopardizing the first one [i.e., Project Alpha], since another one would have to be more fully disclosed." *Id.* at 36:18-21.

Section 2255(b) provides that

> [i]f the court finds . . . that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

See United States v. Grammas, 376 F.3d 433, 436 (5th Cir.2004) ("Section 2255 provides the federal prisoner with a post-conviction remedy to test the legality of his detention by filing a motion to vacate judgment and sentence in his trial court."). The Supreme Court has made clear that a collateral challenge "may not do service for an appeal" and that a § 2255 petitioner "must clear a significantly higher hurdle than would exist on direct appeal" in order to obtain relief. *United States v. Frady,* 456 U.S. 152, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982). "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." *United States v. Vaughn,* 955 F.2d 367, 368 (5th Cir.1992). Similarly, issues that were raised but rejected on direct appeal are barred from consideration on collateral review. *See United States v. Webster,* 392 F.3d 787, 791 (5th Cir.2004). Thus review of convictions under § 2255 ordinarily is limited to (1) "questions of constitutional or jurisdictional magnitude, which may not be raised for the first time on

collateral review without a showing of cause and prejudice," and (2) "[o]ther types of error . . . that could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice." *United States v. Cervantes,* 132 F.3d 1106, 1109 (5th Cir.1998).

A § 2255 motion requires an evidentiary hearing unless the motion, the files, and the record conclusively show the prisoner is entitled to no relief. *United States v. Bartholomew,* 974 F.2d 39, 41 (5th Cir.1992). Upon review of Olis' motion to vacate and the files and records of this case the court concludes that an evidentiary hearing is not necessary because the matters reviewed conclusively show that Olis is not entitled to relief. *See United States v. Drummond,* 910 F.2d 284, 285 (5th Cir.1990), *cert. denied,* 498 U.S. 1104, 111 S.Ct. 1006, 112 L.Ed.2d 1088 (1991) (conclusive but not necessarily direct evidence must exist for court to deny § 2255 motion without a hearing); Rules 8(a) and 12 following § 2255 (recognizing that hearings are not always required, and that Federal Rules of Civil Procedure, including Rule 56, are applicable to § 2255 motions).

III. *Undisputed Facts*

In the year 2000 some analysts expressed concern that there seemed to be a gap between Dynegy's

earnings reports and its cash flow.[2] To address this gap, Dynegy implemented a complex, gas trading transaction known as Project Alpha.[3] Olis' conviction arises from his work on Project Alpha as Dynegy's "Senior Director of Tax Planning and International (and later, Vice-President of Finance)." *Olis,* 429 F.3d at 541. Olis' immediate supervisor was Gene Foster, who was then Dynegy's Vice-President of Tax.[4] The Fifth Circuit has described Project Alpha as a

> plan to borrow $300 million and make it appear to the outside world (and in particular to Dynegy's auditor Arthur Andersen) as if the money was generated by Dynegy's business operations. Project Alpha was designed to generate positive cash flow to Dynegy "from operations" during 2001 and negative cash flow in 2002-05. Specifically, a special purpose entity ("SPE") called ABG Gas Supply was created and owned by Deutsche Bank and Credit Suisse. During 2001, ABG Gas bought natural gas at market prices and sold it to Dynegy at a discount. Dynegy then sold the gas at market prices, netting $300 million. During 2002-05, Project Alpha arranged that ABG Gas would buy gas

---

[2] See Direct Examination of Patrick Boultinghouse, T.Tr. Day 3, Docket Entry No. 98, pp. 226:19-228:5.

[3] See Cross-Examination of Patrick Boultinghouse, T.Tr. Day 4, Docket Entry No. 99, p. 127:12-25.

[4] See Direct Testimony of Gene Foster, T.Tr. Day 6, Docket Entry No. 103, p. 90:3-4. See also Cross-Examination of Patrick Boultinghouse, T.Tr. Day 4, Docket Entry No. 99, p. 149:1-5.

> at market prices and resell it to Dynegy at above-market prices. That money would flow to the banks, which would recoup the $300 million, plus interest.
>
> To support the accounting characterization of the deal as cash flow from operations, ABG Gas and the lenders could not be guaranteed full repayment on their investment. Further, ABG Gas had to be sufficiently "independent" from Dynegy, and the owners of ABG Gas had to bear risk. But contrary to these requirements, Olis, his boss Gene Foster and his colleague Helen Sharkey, secretly put into place the "parent level" hedge and the "tear-up" agreements among Dynegy, ABG's owner banks, and Citibank to ensure that the banks would not lose any money. The Government's proof indicated that Olis, Foster, and Sharkey intentionally concealed the parent level hedge and tear-ups from Jim Hecker, the Arthur Andersen partner responsible for signing off on Dynegy's SEC statements, in order to obtain the desired accounting treatment of the transaction.
>
> On April 25, 2003, following its review of Project Alpha, the SEC required Dynegy to restate the cash flow as derived from a "financing" rather than "operations". . . .

Id. at 541-42.

On June 10, 2003, "Foster, Sharkey, and Olis were indicted for conspiracy to commit mail fraud, wire fraud, and securities fraud (count 1), securities

fraud (count 2), mail fraud (count 3) and wire fraud (counts 4-6)." *Id.* at 542.[5] The indictment alleged that Project Alpha was a scheme to falsely report financing activity as operating cash flow:

> [T]he Defendants . . . would and did conceive, design and execute a plan to borrow money: that is, to engage in a "financing activity" but make it appear that the borrowed funds were cash flow from Dynegy's "risk management activities" to create the false impression and illusion that Dynegy's cash flows from risk-management activities were much improved and that its earnings were of sufficient quality to justify, maintain and increase Dynegy's stock price, and to avoid the potentially adverse effect of a downgrade of Dynegy's credit rating.[6]

The indictment also alleged that in reporting cash flows as operating income the defendants "did intentionally conceal from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging strategy and the 'tear up' language."[7] According to the indictment, the defendants therefore

> falsely report[ed] to the SEC, Rating Agencies, lenders, market and securities analysts,

---

[5] See Docket Entry No. 1.

[6] *Id.* at 8 ¶ 15.

[7] *Id.* at 10-11 ¶ 21.

> and the investing public, by means of electronic filing of Quarterly Reports ("Forms 10-Q") and an Annual Report ("Form 10-K"), that approximately $300,000,000 of "cash flows from financing activities" were "cash flows from operating activities," or more specifically, "cash flows from Risk-management activities," throughout the last nine months of the year 2001.[8]

The Assistant United States Attorneys (AUSA) who prosecuted Olis were Jimmy Sledge, John Lewis, and Belinda Beek; their immediate supervisor was Quincy Ollison; and the United States Attorney for the Southern District of Texas was Michael Shelby.[9]

On June 20, 2003, Olis and his wife engaged attorney Terry Yates to defend Olis against the charges alleged in the indictment.[10] Olis told Yates that Dynegy would pay for his representation.[11] To ensure that Dynegy would agree to pay his fees, Yates drafted an engagement letter stating his hourly rates, Olis signed the letter, and Yates had it faxed to

---

[8] *Id.*

[9] See Testimony of Larry Finder, Exhibit G attached to Docket Entry No. 318, p. 137:15-17. The page numbers used in all the exhibits attached to Docket Entry No. 318 are those belonging to the original document that appear at the side, as opposed to the bottom, of the pages prepared for the exhibit to the Kelly Declaration.

[10] See Yates' Testimony, Exhibit D attached to Docket Entry No. 318, pp. 18:8-9, 19:20-21, 26:1-2, 44:2, 142:20-144:8.

[11] *Id.* at 16:13-18, and 24:13-14.

Cristin Cracraft, a Dynegy in-house attorney. Cracraft phoned Yates and orally confirmed that Dynegy would pay Yates' bills, and that Yates would not charge Olis for attorneys' fees or expenses.[12]

In late June of 2003 Yates and his associate, Mark Clark, obtained boxes of relevant documents from Olis' previous attorney, Paul Coselli, and sought additional documents from Dynegy's outside counsel, Larry Finder.[13] When in July of 2003 Yates had still not received documents from Finder, Yates wrote letters to Finder requesting relevant documents, but still did not obtain documents.[14]

On August 5, 2003, Olis' co-defendants, Foster and Sharkey, entered guilty pleas.[15] Yates learned a few days before Foster and Sharkey were rearraigned that they had decided to plead guilty; Yates believed that their decision was prompted by Dynegy's decision to sop funding their defense.[16] Following Foster's and Sharkey's rearraignments, Olis and the government submitted a joint motion asking the court to declare the case "complex,"[17] and the trial date was

---

[12] *Id.* at 19-21, 23:16-19, 24:13-19, 28-34, 144:2-160:18.

[13] *Id.* at 35-37.

[14] *Id.* at 40:8-42:4, 43:9-14.

[15] *See* Docket Entry Nos. 51-52 (Foster) and 54-55 (Sharkey).

[16] Yates' Testimony, Exhibit D attached to Docket Entry No. 318, pp. 47:7-25, 52:9-21.

[17] *See* Joint Motion, Docket Entry No. 60.

reset to November 3, 2003.[18] The next week Olis' defense team received from the government electronic versions of all the relevant documents scanned onto CDs in a searchable format.[19]

On August 7, 2003, Yates sent Dynegy a bill totaling $15,081.83. Dynegy paid this bill within two weeks by wiring funds into Yates' operating account.[20]

On August 13, 2003, Olis' defense team went to the United States Attorney's Office (USAO) to pick up copies of relevant documents. Upon arriving at the USAO they were invited to visit with the prosecution team and were asked to wait in the Project Alpha room. While there they discovered a copy of the August 7, 2003, bill that Yates had submitted to Dynegy. During the ensuing meeting the prosecutors pressured for Olis to plead guilty. In response, Yates suggested that Olis receive immunity for testifying against other alleged co-conspirators and that the government seek a superceding indictment that did not name Olis.[21] Yates did not ask the prosecutors how they had acquired a copy of his fee bill.

---

[18] *See* Minute Entry from Motion Hearing held on August 8, 2003, Docket Entry No. 57.

[19] Yates' Testimony, Exhibit D attached to Docket Entry No. 318, p. 56:3-23.

[20] *Id.* at 56:24-59:5, 73:8-16. Copies of Yates' August 7, 2003, bill and the notice that it was paid electronically on August 20, 2003, are included in Exhibit AA attached to Docket Entry No. 318.

[21] *Id.* at 60:12-62:24.

When Yates returned to his office he received a hand-delivered letter from Dynegy addressed to Olis from Dynegy's General Counsel, Carol Graebner, stating that beginning on August 18, 2003, fees for defense services and expenses would no longer be advanced but, instead, deposited in an escrow account until such time as Dynegy's board of directors determined that Olis was entitled to receive them.[22] Yates phoned Cracraft to ask if the letter meant that Dynegy was changing its agreement to pay him directly, and to ask if she had provided the government a copy of his fee bill.

Yates testified that Cracraft responded to his question about Dynegy's agreement to pay him directly in a noncommittal manner stating only that she would check with her boss, Graebner, and get back with him.[23] Yates testified that after that conversation he never spoke to Cracraft again.[24] However, Yates also testified that after re-reading Graebner's letter he interpreted it to mean that Dynegy would no longer pay defense fees directly to him but, instead, would secure funds for paying defense fees by depositing them into an escrow account. Yates testified that although he did not have time to check all of the references to underlying documents

---

[22] *Id.* at 63:11-67:20. A copy of the August 13, 2003, letter to Olis from Dynegy's Carol Graebner is included in Exhibit AA attached to the Kelly Declaration.

[23] *Id.* at 68:4-23, 72:5-18.

[24] *Id.* at 71:10-13, 72:17-18, 74:7-14.

such as Dynegy's Articles of Incorporation, he understood the letter to reflect an attempt by Dynegy to comply with the Thompson memorandum.[25] Yates explained that if the funds to pay his fees were placed in escrow such that his bills would be paid by an escrow agent, Dynegy could truthfully tell the government that it was no longer paying for Olis' defense.[26] Yates testified that he did not understand the letter or Cracraft's noncommittal response to his question to mean that Dynegy did not intend to pay his fees for defending Olis.[27] Yates stated that only in March of 2004 did he begin to suspect that Dynegy's use of escrow was not intended to secure payment for Olis' defense but, instead, to deny payment.[28]

In response to Yates' question about how the government had acquired a copy of his fee bill, Cracraft

---

[25] *Id.* at 65:20-25. The Thompson Memorandum was a policy statement authored by the Department of Justice articulating principles governing discretion to indict business organizations. *See United States v. Stein*, 541 F.3d 130, 136-37 (2d Cir.2008). Specifically, the Thompson Memorandum stated that prosecutors could consider "'a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, . . . in weighing the extent and value of a corporation's cooperation." *Id.* (quoting Memorandum from Larry D. Thompson, Deputy Attorney General, United States Department of Justice cited in *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), at VI).

[26] *Id.* at 65:25-66:25.

[27] *Id.* at 64:3-5, 65:4-5, 67:11-14, 84:12-17.

[28] *Id.* at 83:21-84:11.

advised Yates to "[a]sk Larry Finder."[29] Yates never followed up by asking Finder how the government had acquired a copy of his fee bill. Yates testified that he thought the government had purposely left the copy of his fee bill out where he would see it in an effort to intimidate him and pressure Olis to plead guilty,[30] and that after learning that the government had access to his fee bill he was cautious about sending additional bills to Dynegy for payment.[31]

On October 2, 2003, Yates prepared a second invoice to Dynegy for services provided to Olis during July of 2003 totaling $105,176.78.[32] Although Yates testified that he thought he sent this second invoice to Dynegy in October of 2003, the facsimile cover sheet from Yates attached to the copy included in the record before the court is dated November 17, 2003,[33] which was four days after Olis' trial concluded on November 13, 2003. The "comments" section of the cover sheet states:

---

[29] *Id.* at 68:24-69:4. *See also id.* at 70:11-24.

[30] *Id.* at 61:5-15.

[31] *Id.* at 72:23-25. *See also id.* at 75:11-14 (Where Yates testified, "But when I found out they had my billing records, then I just – told them basically hold up everything. We need to figure out what's going on over there before I ship them another bill.").

[32] This multi-page invoice is included in Exhibit AA attached to Docket Entry No. 318 and Bates stamped, Dyn 001048-001057.

[33] *Id.*, at page Bates stamped Dyn 001047.

Attached please find a copy of the July 2003 invoice for the Olis matter. As discussed, the invoice is dated October 2, 2003, but the invoice reflects legal services and expenses incurred during July 2003. Dynegy has represented in correspondence that payment for legal services and expenses incurred prior to August 17, 2003 would be paid to our offices. Please provide payment accordingly for the July services. Thank you for your attention to this matter.[34]

Cracraft approved payment of this bill on November 19, 2003, and on November 21, 2003, Dynegy paid the bill by wiring funds into Yates' operating account.[35]

Olis' jury trial began on November 3, 2003, and ended on November 13, 2003, with convictions on all counts of the indictment.[36] In late November of 2003 Yates advised Olis to hire another lawyer to appeal

---

[34] *Id.*

[35] *Id.* at page Bates stamped Dyn 001046. But see Yates' Testimony, Exhibit D attached to Docket Entry No. 318, pp. 75:1-77:25 (stating that he thought he sent his second bill to Dynegy in October of 2003, that instead of paying him the amount billed Dynegy mistakenly placed that amount in escrow, but did finally pay the invoice on November 21, 2003), and p. 83:8-12 (stating that he had to re-send this bill).

[36] See Trial Transcripts: Day 1, Docket Entry No. 122; Day 2, Docket Entry No. 97; Day 3, Docket Entry No. 98; Day 4, Docket Entry No. 99; Day 5, Docket Entry No. 102; Day 6, Docket Entry No. 103; Day 7, Docket Entry No. 104; Day 8, Docket Entry No. 105. See also Verdict, Docket Entry No. 92.

his convictions, and Olis hired David Gerger.[37] Sometime after the trial Yates also advised Olis that he would need to have an expert to testify about the amount of loss because amount of loss was a significant factor for the sentencing guidelines. Olis provided Yates $50,000 to hire an expert, which Yates deposited in his trust account.[38] In late 2006 Yates returned the $50,000 to Olis because the experts who participated in Olis' sentencing hearings did not charge for their services or expenses.[39]

In December of 2003 Yates prepared his third invoice to Dynegy for services provided to Olis from August 1-17, 2003, totaling $98,517, which Dynegy paid on February 12, 2004.[40]

In April of 2004 Yates prepared his fourth and final bill to Dynegy, totaling $448,556, for services provided to Olis at both the guilt-innocence and sentencing phases of his trial. When by June of 2005 Dynegy failed either to pay this bill or to respond to his inquiries about why it had not been paid, Yates sued Dynegy in state court.[41] During litigation of this

---

[37] Yates Testimony, Exhibit D attached to Docket Entry No. 318, p. 82:10-21.

[38] *Id.* at 92:5-21.

[39] *Id.* at 93:25-95:22.

[40] *Id.* at 79:1-4, 80:6-13, 210:12-23.

[41] *Id.* at 227:25-229:5 (stating that the last bill was for services provided between August 18, 2003, and April 7, 2004); 88:15-90:21 (Dynegy neither paid Yates nor disputed his bills); 119:4-5 and 137:10-12 (identifying amount of Yates' last bill).

lawsuit against Dynegy, Yates learned that Olis' prosecutors, including the former United States Attorney for the Southern District of Texas, Michael Shelby, had pressured Dynegy to stop advancing funds for Olis' defense. Documents produced during discovery include a January 17, 2003, letter from Shelby to Dynegy's President and CEO, Bruce Williamson, memorializing a January 10, 2003, meeting at which Dynegy's outside counsel, Lawrence Finder and Joseph Cialone, expressly approved Shelby and Williamson having direct contact,[42] and e-mails exchanged by Shelby and Williamson on July 18 and 19, 2003, about Dynegy's decision to stop advancing funds for Olis' defense.[43]

Finder testified that on July 15, 2003, the lead prosecutor on Olis' case, Jimmy Sledge, and Sledge's supervisor, Quincy Ollison, telephoned Finder and asked him why Dynegy was paying Olis' attorneys' fees,[44] and directed Finder to provide Sledge and Ollison a copy of the statute that governed such payments by Illinois corporations such as Dynegy.[45] Finder testified that he provided Sledge and Ollison a

---

[42] Exhibit Q attacked to Docket Entry No. 318.

[43] See Exhibits V and W attached to Docket Entry No. 318.

[44] Testimony of Lawrence Finder, Exhibit G attached to Docket Entry No. 318, pp. 137:7-139:5.

[45] *Id.* at 139:5-11.

copy of the Illinois statute[46] and that about two days later they told him, "[w]e read the Illinois law and it seems Dynegy isn't obligated under [the] Thompson [memorandum] to pay the Attorneys' fees."[47] Finder testified that he related his conversation with Sledge and Ollison about Olis' attorneys' fees to Dynegy and that on July 23, 2003, he received from Dynegy and forwarded to Olis' prosecutors a resolution passed by Dynegy's board of directors[48] pursuant to which all future advancements of expenses, including attorneys' fees, incurred by Olis would be remitted to an escrow account and would remain in escrow until Dynegy's board of directors determined that Olis had acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of Dynegy and that Olis had no reasonable cause to believe that his conduct was unlawful.[49]

IV. *Analysis*

Olis argues that he has been wrongfully convicted and that his sentence should be vacated, set aside, or corrected because (1) the United States violated his Fifth and Sixth Amendment rights to

---

[46] *Id.* at 139:10-11, 149:1-21. See also § 8.75 of the Illinois Business Corporation Act, Exhibit U attached to Docket Entry No. 318.

[47] *Id.* at 152:3-5.

[48] *Id.* at 157:8, 163.

[49] Resolution 2003-7 of the Board of Directors of Dynegy Inc., Exhibit X attached to Docket Entry No. 318.

present the defense of his choice by pressuring Dynegy to stop advancing funds to pay the cost of his defense, and (2) he received constitutionally inadequate assistance of counsel at trial and on direct appeal. The United States argues that Olis' § 2255 motion should be summarily denied because the record before the court establishes that he is entitled to no relief.

A. Defense of Choice

Citing *United States v. Stein,* 435 F.Supp.2d 330 (S.D.N.Y.2006) (Stein I), *United States v. Stein,* 495 F.Supp.2d 390 (S.D.N.Y.2007) (Stein IV), and *United States v. Stein,* 541 F.3d 130 (2d Cir.2008), Olis argues that the United States violated his Fifth and Sixth Amendment rights by using the threat of indictment to pressure Dynegy to stop advancing funds to pay the cost of his defense.[50] Olis contends that the government's pressure on Dynegy violated his constitutional rights by (1) depriving him of due

---

[50] Memorandum of Points and Authorities in Support of Jamie Olis' Motion to Set Aside his Conviction Pursuant to 28 U.S.C. § 2255 (Olis' Points and Authorities), Docket Entry No. 315, pp. 31-69; Jamie Olis' Response to Government's Answer and Motion for Summary Judgment, and Motion for Reconsideration of Olis' Motion for Discovery (Olis' Response), Docket Entry No. 349, pp. 2-27; and Second Notice of Supplemental Authority Supporting Petitioner Jamie Olis' Motion to Set Aside His Conviction Pursuant to 28 U.S.C. § 2255, Docket Entry No. 360 (providing the court a courtesy copy of the Second Circuit's *Stein* opinion).

process of law in violation of the Fifth Amendment[51] and (2) interfering with his right to expend resources legally available to him on the defense of his choice.[52] The government argues that these claims are procedurally barred or subject to dismissal because the government's actions did not violate Olis' constitutional rights.[53]

1. *Procedural Bar*

When a defendant raises an issue for the first time during collateral review he must ordinarily "show both cause for his procedural default and actual prejudice resulting from the error." *United States v. Gaudet,* 81 F.3d 585, 589 (5th Cir.1996). *See also Cervantes,* 132 F.3d at 1109, and *Frady,* 102 S.Ct. at 1594. "This cause-and-actual-prejudice standard is significantly more rigorous than even the plain error standard ... applied on direct appeal." *Id.* The procedural bar does not apply, however, to a claim that could not have been raised on direct appeal, such as those alleging ineffective assistance of counsel. *United States v. Pierce,* 959 F.2d 1297, 1301 (5th Cir.),

---

[51] Olis' Points and Authorities, Docket Entry No. 315, pp. 45-51; Olis' Response, Docket Entry No. 349, pp. 22-27.

[52] Olis' Points and Authorities, Docket Entry No. 315, pp. 51-52; Olis' Response, Docket Entry No. 349, pp. 15-22.

[53] United States' Answer to Motion to Vacate Pursuant to 28 U.S.C. § 2255, Motion for Summary Denial, and Supporting Memorandum of Law (United States' Memorandum), Docket Entry No. 346, pp. 8-41.

cert. denied, 506 U.S. 1007, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). For the reasons explained below, the court concludes that Olis has established cause for his procedural default, but has not established actual prejudice.

(a) Cause

Olis argues that he could not have raised his claim for governmental interference with his ability to fund his defense prior to trial or on appeal because neither he nor his attorneys knew that the government had pressured Dynegy to stop funding his defense. Olis asserts that it is not his contention that the Thompson memorandum alone violated his constitutional rights but, instead, it was the way his prosecutors improperly used the Thompson memorandum to threaten Dynegy that constituted the violation. Citing Yates' testimony, Olis argues that he was not aware of the government's actions and that "[i]f [he] had had any idea . . . [that the government had pressured Dynegy, he] would [have] filed a motion, [and] gone in front of Judge Lake[,] and asked him to intervene."[54] Similarly, citing excerpts from the testimony of Yates and Finder (Dynegy's outside counsel), the government argues that Olis is unable to show cause for not having raised this issue before now because prior to his trial Olis possessed, or by

---

[54] Yates' Testimony, Exhibit D attached to Docket Entry No. 318, pp. 84:24-85:1.

reasonable means could have obtained, facts needed to raise this claim.[55] The court disagrees.

A § 2255 petitioner has adequate "cause" for failing to raise a constitutional claim when there existed "some external impediment preventing counsel from constructing or raising the claim." *McCleskey v. Zant,* 499 U.S. 467, 111 S.Ct. 1454, 1472, 113 L.Ed.2d 517 (1991). To satisfy the cause standard a petitioner must show that "'some objective factor external to the defense' prevented him from raising on direct appeal the claim he now advances." *United States v. Guerra,* 94 F.3d 989, 993 (5th Cir.1996) (quoting *Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986)).

> Objective factors that constitute cause include interference by officials that makes compliance with the procedural rule impracticable, a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion, and ineffective assistance of counsel in the constitutional sense.

Id. The fact that a petitioner did not possess or could not reasonably have obtained "certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event." *McCleskey,* 111 S.Ct. at 1472. Moreover, "the

---

[55] United States' Memorandum, Docket Entry No. 346, pp. 10-16.

mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Murray,* 106 S.Ct. at 2644.

The United States does not argue that Olis and/or his trial counsel knew that government prosecutors had pressured Dynegy to stop paying for Olis' defense but, instead, argues that prior to trial Olis' chief trial counsel, Yates, either possessed enough information or upon investigation could have discovered enough information to raise the claim that Olis is now raising. Citing excerpts from Yates' testimony during trial of his state court action against Dynegy, the United States argues that prior to trial Yates knew that Dynegy had stopped paying Sharkey's attorney's fees and had decided to escrow funds to pay Olis' attorneys' fees, knew that corporations like Dynegy were attempting to comply with the Thompson memorandum, knew that the government had received a copy of his first bill for services within a week of his having submitted it to Dynegy, and knew that a pretrial procedure existed that would have allowed him to address the impropriety of Dynegy's decision to escrow funds for payment of Olis' defense. Because Dynegy's in-house attorney, Cracraft, had advised Yates to ask Dynegy's outside counsel, Finder, about how the government had received a copy of the first bill that he submitted to Dynegy, and because at Yates' state court trial against Dynegy, Finder testified about the pressures the Olis' prosecutors had exerted on Dynegy to stop

paying for Olis' defense, the United States argues that Olis has failed to show cause as a matter of law because Yates purposely chose not to pursue the issue with Finder.[56]

Yates' testimony is replete with evidence that before learning that the government had a copy of the fee bill he had submitted to Dynegy he had contacted Finder many times in an effort to acquire documents and other relevant information but that Finder had never been forthcoming.[57] Although the government argues that Finder had knowledge of the pressures that Olis' prosecutors exerted on Dynegy to stop paying his fees, the government has failed to cite any evidence showing that Finder shared this knowledge with Yates, or that, if asked, Finder would have shared this knowledge with Yates. In light of the fact that Finder failed to share any other relevant information with Yates despite Yates' repeated attempts to acquire relevant information from Finder, the court is not persuaded that had Yates asked Finder how the government had acquired a copy of the bill that he submitted to Dynegy in August of 2003 that Finder would have told him that Olis' prosecutors had pressured Dynegy to stop paying for Olis' defense. Since it is undisputed that Olis and his attorneys only learned of the affirmative acts that his

---

[56] *Id.* at pp. 16-17.

[57] *See* Yates Testimony, Exhibit D attached to Docket Entry No. 318, pp. 40:8-43:14, 199:15-201:12 (explaining his unsuccessful efforts to obtain documents from Finder).

prosecutors used to pressure Dynegy to stop paying the costs of his defense during discovery for the state court trial, the court concludes that Olis has established cause for not having raised this issue on a prior occasion because on the prior occasions at which the United States argues Olis could and should have raised this claim neither Olis nor his counsel possessed a factual basis on which to do so. *See Guerra*, 94 F.3d at 993 (objective factors for finding cause may include a showing that the factual and legal bases for the claim was not reasonably available to counsel at the prior occasions).

(b) Prejudice

To satisfy the prejudice prong of the cause and prejudice standard Olis must show that but for the government's interference with his ability to fund his defense, he might not have been with his ability to fund his defense, he might not have been convicted. *Id.* at 994. The United States argues that Olis is unable to establish the prejudice prong of the cause and prejudice analysis because the evidence of Olis' guilt was so overwhelming that he would have been convicted even if Dynegy had fully funded his defense.

Olis argues that if Dynegy had fully funded his defense his trial counsel would have been able to purchase software needed to search the electronic documents provided by the government, engage a jury consultant, and hire expert witnesses – all of

which would have better prepared his counsel to defend him at trial. As evidence that the outcome of his trial might have been different had the government not pressured Dynegy to stop advancing funds for his defense, Olis argues that had his defense been fully funded his trial counsel would have been able to hire experts who could have discredited the testimony of Jeffrey Heil regarding the amount of loss attributable to Project Alpha[58] and the testimony of James Hecker regarding the propriety of the accounting treatment accorded to Project Alpha in Dynegy's financial statements,[59] and would have been able to staff the defense team with enough attorneys to review all the evidence, investigate the facts, and prevent the errors on which his claim for ineffective assistance of counsel are based.[60]

In upholding Olis' convictions the Fifth Circuit observed that "[a] reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating e-mails among Olis and his co-indictees and a wealth of other evidence, could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes." *Olis*, 429 F.3d at 543. Since Olis fails to demonstrate that better funding would have allowed him to refute and/or discredit Foster's testimony, or any of the

---

[58] Olis' Points and Authorities, Docket Entry No. 315, pp. 54-63.

[59] *Id.* at 64-66.

[60] *Id.* at 66-69.

incriminating e-mails exchanged with his co-conspirators, some of which plainly acknowledged that they were the only people to whom Project Alpha had been fully disclosed, the court is not persuaded that Olis has shown that but for the government's interference with his ability to fund his defense he might not have been convicted.

(c) Conclusions

The court is persuaded that Olis has established cause for not having raised his claim that the government wrongfully interfered with his ability to fund the defense of his choosing on a prior occasion because neither he nor his counsel possessed a factual basis that would have allowed them to raise it earlier. Nevertheless, the court concludes that Olis is procedurally barred from raising this claim under § 2255 because he has failed to establish the prejudice prong of the cause and actual prejudice standard by showing that but for the government's interference with Dynegy's commitment to advance funds for the cost of his defense he might not have been convicted.

2. Constitutional Violations

Alternatively, the court concludes that even if Olis were not procedurally barred from raising his claim that the United States violated rights guaranteed by the Fifth and Sixth Amendments by pressuring Dynegy to stop advancing funds to pay the costs of his defense and thereby interfered with his

right to present the defense of his choosing, this claim would not entitle Olis to any relief because his own submissions establish that he was not prejudiced by the government's actions.

(a) Fifth Amendment

Olis' Fifth Amendment claim is that the United States' interference with Dynegy's agreement to advance funds for his defense violated his right to due process by "unjustifiably imped[ing his] fundamental right to use resources lawfully available to him to conduct his defense to criminal charges."[61] Alternatively, Olis argues that the United States' conduct violated his substantive due process rights to a fair trial and to spend funds legally available to him to mount the defense of his choosing because that conduct involved "acts so outrageous as to 'shock the conscience.'"[62] The United States argues that Olis' Fifth Amendment claim fails because to whatever extent the right he asserts is protected by the Constitution, it is protected by the Sixth – not the Fifth – Amendment.[63] Acknowledging that the Sixth Amendment safeguards rights related to criminal prosecutions, Olis argues that its protections do not exhaust the broader right to fairness in the criminal process

---

[61] *Id.* at 45.

[62] *Id.* at 47.

[63] United States' Memorandum, Docket Entry No. 346, p. 41.

that lies at the heart of his Fifth Amendment claim, and argues that

> if the Court were to conclude that [his] claim is not properly analyzed as an aspect of the right to counsel, the claim would not be "covered by: the Sixth Amendment, but may nevertheless be protected by the Fifth Amendment's guarantee against arbitrary and unfair government conduct.[64]

Olis' Fifth Amendment argument founders on the principles of Constitutional law that (1) require the right allegedly protected by substantive due process to be carefully described or formulated, *see Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258, 2668, 138 L.Ed.2d 772 (1997), and (2) require substantive due process claims to be invoked cautiously such that "where 'a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 1714, 140 L.Ed.2d 1043 (1998) (quoting *Albright v. Oliver,* 510 U.S. 266, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994). Olis' description of the right that he seeks to protect as a "fundamental right to use resources lawfully available to him to conduct his defense to criminal charges" is insufficiently

---

[64] Olis' Response, Docket Entry No. 349, p. 25.

precise to state a Fifth Amendment claim. As observed by the court in *United States v. Rosen,* 487 F.Supp.2d 721, 737 (E.D.Va.2007):

> [d]istilled to its essence, defendant['s] due process claim is that the government treated [him] unfairly because it interfered with [his] liberty or property interest to expend [his] own funds towards [his] defense. Clearly, whatever protection that right receives derives from the Sixth Amendment, and in accordance with *City of Sacramento,* the claim must be measured by that Amendment's standards . . . There is no need to undertake a separate inquiry addressing substantive due process when the right is protected, to whatever extent it is protected, by another constitutional text. For this reason, defendant['s] Fifth Amendment claim fails.

For these reasons the court concludes that Olis' claim that the actions of the United States infringed his right to present the defense of his choosing must be analyzed under the Sixth Amendment.

(b) Sixth Amendment

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The right to counsel guaranteed by the Sixth Amendment guarantees more than the mere presence of a lawyer at a criminal trial; it protects,

inter alia, the right of all defendants to effective assistance of counsel. *See Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 2008, 32 L.Ed.2d 530 (1972); and *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The Sixth Amendment also protects an individual's right to choose the lawyer or lawyers he or she desires, *see Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988), and to use one's own funds to mount the defense that one wishes to present. *See Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 528 (1989).

Asserting that there is no evidence that Olis was denied the counsel of his choice, the United States contends that Olis must establish prejudice from the alleged Sixth Amendment violation because that violation is analogous to a claim for ineffective assistance of counsel.[65] Citing *Rosen,* 487 F.Supp.2d at 721, the United States argues that Olis is entitled to no relief on his Sixth Amendment claim because the record in this case demonstrates, "as a matter of law, that the escrowing of Olis' attorneys fees by Dynegy did not impact his attorneys' performance in a manner that rendered the outcome of Olis' trial unreliable."[66] Citing *Stein I,* 435 F.Supp.2d at 369, Olis argues that the United States' interference with his Sixth Amendment rights was presumptively prejudicial

---

[65] United States' Memorandum, Docket Entry No. 346, pp. 37-38.

[66] *Id.* at 39.

because like the deprivation of the right to counsel of choice at issue in *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the violation of which he complains was complete irrespective of the quality of the representation he received.[67]

In *Gonzalez-Lopez,* 126 S.Ct. at 2563, the Supreme Court held that no showing of prejudice is required for a Sixth Amendment violation where a district court erroneously denied a defendant his retained counsel of choice by not allowing that counsel to appear pro hac vice. The Court explained that

> [d]eprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice -- which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Id.

Gonzalez-Lopez is plainly distinguishable and, therefore, not controlling here. In *Gonzalez-Lopez* the

---

[67] Olis' Points and Authorities, Docket Entry No. 315, pp. 52-53.

court's action denied defendant his retained counsel of choice, while the alleged government interference here did not deny Olis his counsel of choice. To the contrary, despite knowing well before trial that Dynegy had decided to stop advancing funds to pay fees for Olis' defense directly to counsel and that Dynegy had stated its intention to place those funds in an escrow account, Olis' defense counsel remained fully engaged in this case and represented Olis through trial notwithstanding the government interference of which he complains.

Recognizing this distinction Olis argues that the loss of Dynegy's fee advances had an adverse effect on his ability to mount a defense by reducing the resources available to his counsel. In other words, Olis claims that the loss of the Dynegy fee payments reduced his counsels' effectiveness. Olis' effectiveness argument is akin to a Sixth Amendment ineffective assistance of counsel claim. *See Rosen,* 487 F.Supp.2d at 734 (analogizing a similar situation to ineffective assistance of counsel claims governed by *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Just as a showing of prejudice is required in that Sixth Amendment context, so too, for the same reasons, should such a showing be required in this Sixth Amendment context. The court thus concludes that this is not a case like *Gonzalez-Lopez* in which the defendant was denied counsel of choice altogether

but, instead, a case like *Strickland* where the claim is that counsel's effectiveness was impaired.[68]

(1) Presumed Prejudice

Olis argues that even if prejudice is required, it must be presumed here because the government's interference with his right to use his own resources to pay his lawyers is a "structural error" for which prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost."[69] Olis argues that the prosecutors'

> misconduct here worked a structural error because it is impossible to precisely reconstruct how Olis might have conducted his defense had he received full funding from Dynegy. It is certain, however, that the funds would have helped him better prepare for the unusually complex trial. The due process and Sixth Amendment violations affected the "framework within which the trial proceed[ed]." *Gonzalez-Lopez,* 126 S.Ct. at 2564.[70]

---

[68] Just as a civil tortious interference with contract claim does not give rise to a remedy when no damage resulted from the interference, so should a Sixth Amendment interference claim not give rise to a remedy absent a showing of prejudice unless, as is not the case here, the interference rises to the level of a structural defect.

[69] Olis' Points and Authorities, Docket Entry No. 315, p. 53 (citing *Strickland,* 104 S.Ct. at 2067).

[70] *Id.*

The difficulty of assessing prejudice in this case is no greater than the difficulty of doing so in the typical ineffective assistance of counsel case, which is now routine in federal courts. *See Strickland,* 104 S.Ct. at 2069 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Since Olis must show prejudice to prevail on his claim, it remains only to assess whether prejudice has occurred.

(2) Actual Prejudice

Olis argues that prejudice is readily shown in this case because if he had access to funds from Dynegy

> he would have retained experts to counter the prosecutions' theories, investigators to investigate the facts and potential witnesses, and a jury consultant; he would have purchased a searchable database to better enable review of the enormous volume of discovery; and his attorneys would have been better prepared to meet the charges against him.[71]

Olis' argument is readily refuted by his own submissions because they establish undisputedly that Dynegy's failure to advance fee payments to Olis'

---

[71] *Id.* at 53-54.

defense counsel did not deprive Olis of the ability to present the defense of his choosing at trial.

The evidence submitted in support of Olis' § 2255 motion establishes that Dynegy paid the fee bills that Yates submitted before and immediately after trial,[72] that Yates did not bill Dynegy for Olis' trial representation until April of 2004[73] – after Olis had been sentenced – because after discovering that the government had acquired a copy of the first bill he sent to Dynegy, Yates did not want the prosecutors to discern his "game plan" from bills submitted to Dynegy.[74] The evidence establishes that Yates did not know that Dynegy did not intend to pay his fee for representing Olis at trial until Dynegy failed to pay his final bill, which he submitted in April of 2004,

---

[72] Yates Testimony, Exhibit D attached to Docket Entry No. 318, pp. 56:24-59:5 and 73:8-16 (explaining that he submitted his first bill on August 7, 2003, and that it was paid two weeks later with funds that were wired to his operating account); pp. 74:21-77:25 and 191:6-21 and Exhibit AA attached thereto (explaining that he prepared his second bill on October 2, 2003, resubmitted it to Dynegy on November 17, 2003, and received payment for it on November 21, 2003); pp. 79:1-4, 80:6-13, and 210:12-23 (explaining that he prepared his third bill to Dynegy in December of 2003 and received payment in February of 2004).

[73] *Id.* at 227:25-229:5 (stating that the last bill was for services provided between August 18, 2003, and April 7, 2004).

[74] *Id.* at 75:11-14 (Yates testified, "[W]hen I found out they had my billing records, then I just – told them basically hold up everything. We need to figure out what's going on over there before I ship them another bill.").

long after Olis' trial ended.[75] The evidence establishes that Yates and Clark performed the work required to represent Olis.[76] The evidence establishes that since the amount of loss caused by Project Alpha was not only a sentencing issue, but also the subject of a motion in limine that the court granted, Olis' trial counsel never sought experts for the guilt-innocence phase of Olis' trial.[77] The evidence establishes that Olis' trial counsel felt good about the defense put on at trial and expected the jury to acquit Olis because the court had granted Olis' request for an advice-of-counsel jury instruction, which had been the heart of Olis' defense.[78] Olis' defense was based on the contention that he had relied in good faith on the advice received from Dynegy's accountants and attorneys and that he never intended to deceive anyone.[79] This defense was rejected by the jury and

---

[75] *Id.* at 227:25-229:5.

[76] *Id.* at 122:5-6 ("We were doing the work."); 123:13-14 ("It was tedious hard work, but we did it.").

[77] *Id.* at 127:11-16, 128:13-129:1, 215:11-216:8; Clark Testimony, Exhibit F attached to Docket Entry No. 318, pp. 187:19-188:9.

[78] *Id.* at 224:14-225:7 and 251:16-20.

[79] See also T.Tr. Day 8, Docket Entry No. 105, pp. 69:19-70:3 (Yates' final argument to the jury referencing the advice-of-counsel instruction given on page 13 of the jury instructions: "[M]y view of this case would be from what Judge Lake tells you on page 13 about two-thirds down. It's kind of a simple, simple review of the case, which what he tells you, that if you rely on an accountant or a lawyer – and what Judge Lake tells you is so important. He didn't say you have to rely on an audit accountant or a tax accountant. He just tells you an accountant. They're all

(Continued on following page)

Olis' convictions were upheld on appeal due, in large part, to the testimony of co-indictee, Gene Foster, and to the content of incriminating e-mail messages circulated among Olis and his co-conspirators. *Olis,* 429 F.3d at 542. When asked about the hardships that he faced due to Dynegy's failure to advance fee payments, Olis' chief trial counsel testified that he had difficulty paying bills and that he lost staff in the spring of 2004, but did not testify that he had suffered any hardships that negatively impacted his ability to defend Olis at trial.[80]

The evidence also establishes that Olis had funds available that were deliberately not used for his defense. Yates testified that he never asked the Olises for money for his representation:

> I had an oral agreement I made with the Olises on June the 20th of 2003 that I would not charge them; Dynegy was paying. And I wasn't going to break my word to the Olises just because Dynegy broke their word for me. I was never going to charge the Olises, never have, never will charge the Olises.[81]

Yates testified that when he determined Olis needed an expert for sentencing, he requested the

---

the same. And if you do so in good faith, then it obviates the intent, it takes it away. And that's what happened in this case. And it's real, real simple.").

[80] Yates' Testimony, Exhibit D attached to Docket Entry No. 318, pp. 120:17-124:2.

[81] *Id.* at 91:8-13.

money from Olis and his wife and they provided him with $50,000.[82] Undisputed evidence also established that between 1999 and 2002 Olis earned $1,217,507 at Dynegy.[83]

Because Olis' own evidence undisputedly establishes (1) that Dynegy paid the bills that his trial counsel submitted before and after the guilt-innocence phase of his trial, (2) that trial counsel neither asked Dynegy for funds to purchase software or to hire an expert for the guilt-innocence phase of the trial nor made any attempt to seek out or obtain any of these resources for that phase of the trial, and (3) that when Olis was asked for funds to hire an expert for the sentencing phase of his trial Olis provided $50,000 for that purpose, the court concludes that Olis has failed to present any evidence showing either that he lacked funds needed to mount the defense of his choosing or that the defense presented at his trial was anything other than the defense he chose to present and would have presented even if the government had not pressured Dynegy to stop advancing funds to his attorneys.

---

[82] *Id.* at 91:14-95:6.

[83] Testimony of Jane Jones, Dynegy's former Vice-President of Awards and Technology, T.Tr. Day 7, Docket Entry No. 104, pp. 191:14-193:8.

B. Inadequate Assistance of Counsel

Olis argues that he received constitutionally inadequate assistance of counsel because his trial counsel (a) failed to object to the constructive amendment of the indictment, (b) failed to object to the inclusion of an admittedly biased juror on the panel and permitted the court to speak to that juror privately, (c) failed to object to legally erroneous jury instructions, and (d) failed to take other necessary steps.[84] Olis argues that each of these inadequacies of counsel deprived him of his fundamental right to a fair trial and resulted in the conviction of an innocent man.

1. *Standard of Review*

Ineffective assistance of counsel claims may be brought in a collateral proceeding under § 2255 whether or not the petitioner could have raised the claim on direct appeal. *Massaro v. United States,* 538 U.S. 500, 123 S.Ct. 1690, 1693, 155 L.Ed.2d 714 (2003). A claim of ineffective assistance of counsel can be made for the first time in a motion to vacate because it raises an issue of constitutional magnitude and as a general rule cannot be resolved on direct appeal. *Id.* at 1693-94. *See also United States v. Bass,* 310 F.3d 321, 325 (5th Cir.2002).

---

[84] Olis' Points and Authorities, Docket Entry No. 315, pp. 84-104.

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland,* 104 S.Ct. at 2052. To prevail Olis must make two showings: (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that his trial counsel's unreasonable performance prejudiced him, i.e., that the errors were so serious as to deprive him of a fair trial with a reliable result. *United States v. Fuchs,* 467 F.3d 889, 910 (5th Cir.2006), *cert. denied,* ___ U.S. ___, 127 S.Ct. 1502, 167 L.Ed.2d 241 (2007) (citing *Strickland,* 104 S.Ct. at 2064). Failure to establish either of the two prongs of the *Strickland* test requires a finding that counsel's performance was constitutionally effective, and courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland,* 104 S.Ct. at 2065.

2. *Analysis*

(a) Constructive Amendment of the Indictment

Olis argues that his trial counsel rendered constitutionally inadequate assistance by failing to object when the government constructively amended the indictment by abandoning the theory of liability posited therein that he and his co-conspirators concealed material information from Dynegy's auditors

and thereby caused Dynegy to falsely report the proceeds from Project Alpha as proceeds from operating activities instead of proceeds from financing activities.[85] Asserting that the indictment was not constructively amended, the United States argues that Olis' trial counsel's failure to object on this basis was not constitutionally inadequate because the failure to object did not fall below an objective standard of reasonableness and did not prejudice Olis.[86]

(1) Applicable Law

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and the cause of the accusation." Deriving from these rights guaranteed by the Fifth and Sixth Amendments is a defendant's "right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States,* 361 U.S. 212, 80

---

[85] *Id.* at 69-86; Olis' Response, Docket Entry No. 349, pp. 28-36.

[86] United States' Memorandum, Docket Entry No. 346, p. 43.

S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (reversing conviction where the indictment charged obstruction of sand shipments into Pennsylvania, but the trial court allowed evidence and instructed the jury that defendant could be convicted of either obstructing shipments of sand into Pennsylvania or obstructing shipments of steel out of Pennsylvania). Consequently, "after an indictment has been returned its charges may not be *broadened* through amendment except by the grand jury itself." *Id.* at 272 (emphasis added). Conversely, when an amendment to the indictment *narrows* the scope of the allegations made against a defendant, the defendant's constitutional rights are generally not violated. *See United States v. Miller,* 471 U.S. 130, 105 S.Ct. 1811, 1819-20, 85 L.Ed.2d 99 (1985) ("where an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment"). *See also United States v. Robinson,* 974 F.2d 575, 578 (5th Cir.1992) ("when an indictment alleges non-essential facts, the government need not prove them in order to sustain a conviction"). The Fifth Circuit has explained that a constructive amendment of the indictment "occurs when the trial court through its instructions and facts it permits in evidence allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment." *United States v. Griffin,* 324 F.3d 330, 355 (5th Cir.2003). *See also United States v. Young,* 730 F.2d

221, 223 (5th Cir.1984) (constructive amendment occurs when "the conviction rest[s] upon a set of facts distinctly different from that set forth in the indictment").

(2) Indictment

The indictment charged Olis with conspiracy to commit securities fraud, mail fraud, and wire fraud, and with the underlying substantive offenses. The indictment alleged that Olis and his co-conspirators executed a plan called "Project Alpha" to falsely report financing activity as operating cash flow:

> [T]he Defendants . . . would and did conceive, design and execute a plan to borrow money: that is, to engage in a "financing activity" but make it appear that the borrowed funds were cash flow from Dynegy's "risk management activities" to create the false impression and illusion that Dynegy's cash flows from risk-management activities were much improved and that its earnings were of sufficient quality to justify, maintain and increase Dynegy's stock price, and to avoid the potentially adverse effect of a downgrade of Dynegy's credit rating.[87]

The indictment alleged that

> The Defendants, and their coconspirators and agents, knew and intended that, during

---

[87] Indictment, Docket Entry No. 1, p. 8 ¶ 15.

the first nine months ending on December 31, 2001, Project Alpha would create the appearance of improved cash flows from risk-management activities through the execution of an essentially circular breakeven five-year natural gas contract between Dynegy and a specially-created corporation, sometimes referred to as either a Special Purpose Entity ("SPE") or a Special Purpose Vehicle ("SPV"). Project Alpha was to be funded with loans from financial institutions . . . The Project Alpha Lenders expected and required full repayment, with interest, or a similarly assured return . . .

To ensure the Project Alpha Lenders demand of full repayment, with interest or other assured return, the Defendants, and their coconspirators and agents, did secretly adopt a 100% hedging strategy and did secretly add special "tear-up" language to the Project Alpha transaction documents. Thus, as the Defendants and their coconspirators and agents well knew, intended, and believed, Project Alpha was, in fact, a loan structured to appear as a 5-year natural gas contract that should have been disclosed as cash flows from financing activities: that is, as a loan (debt) rather than as cash flows from risk-management (operating) activities in Dynegy's financial statements (Forms 10-Q and 10-K) for the 2nd, 3rd, and 4th quarters of, and for the year, 2001.

The Defendants, and their coconspirators and agents, knew and understood that

> Generally Accepted Accounting Principles ("GAAP") required that an SPE be an independent entity and that the SPE, and the financial institutions that funded the SPE, could not be assured or guaranteed full repayment of, or a return on, their investment, but had to bear some risk of losing money. The Defendants and their coconspirators and agents knew this because Dynegy's auditors had warned that either a 100% hedging strategy or "tear-up" language would prevent Dynegy from reporting the cash flow from . . . Project Alpha . . . as cash flows from risk-management activities in its publicly-filed financial statements. Notwithstanding the warning of Dynegy's auditors, the Defendants, and their coconspirators and agents, intended to, decided to, and did implement a 100% hedging strategy and did include "tear up" language in the Project Alpha documents to protect and to ensure that the Project Alpha Lenders would not lose money.
>
> The Defendants, and their coconspirators and agents, did intentionally conceal from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, the implementation and effect of the 100% hedging strategy and the 'tear up' language.[88]

---

[88] *Id.* at 9-11 ¶¶ 18-21.

According to the indictment, the defendants therefore

> falsely report[ed] to the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, by means of electronic filing of Quarterly Report ("Forms 10-Q") and an Annual Report ("Form 10-K"), that approximately $300,000,000 of "cash flows from financing activities" were "cash flows from operating activities," or more specifically, "cash flows from Risk-management activities," throughout the last nine months of the year 2001.

The Defendants, and their coconspirators and agents, caused Dynegy's auditors to mail, and Dynegy did in fact receive, through the United States mail, an accounting opinion (sometimes referred to as an "SAS 50" letter) advising that Dynegy could report cash flows resulting from the Project Alpha natural gas contract in the "operating cash flows" section of Dynegy's Forms 10-Q and 10-K. As the Defendants, and their coconspirators and agents intended, the accounting opinion provided by Dynegy's auditors and the representation letter upon which it was based, did not reflect the hedging and "tear up" features of Project Alpha that made the transaction, in fact, a financing activity: that is, a loan (debt).[89]

---

[89] *Id.* at 11 ¶¶ 21-22.

The indictment also alleged that

> [o]n or about May 10, 2001, the Defendants circulated via email among themselves documentation reflecting the "tear up" and 100% – or "back-to-back" ("BTB") – hedging features of the Project Alpha transaction that had been, and would continue indefinitely to be, concealed from Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, and the Defendants knew, acknowledged and agreed that this documentation should "never, never, never go to anyone" because they were "the only ones that have complete knowledge of this transaction."[90]

(3) Application of Law to the Facts

Asserting that "[t]he gravamen of the indictment was Olis' participation in a scheme to achieve an incorrect and false accounting result, and thereby to defraud 'Dynegy's auditors, the SEC, Rating Agencies, lenders, market and securities analysts, and investing public,'"[91] Olis argues that

> at trial the government expressly eschewed any attempt to demonstrate that the accounting result was improper because of the outside hedges and tear-ups, and instead

---

[90] *Id.* at 11-12 ¶ 23.

[91] Olis' Points and Authorities, Docket Entry No. 315, p. 73.

> focused the jury's attention exclusively on the question whether Olis hid facts from Jim Hecker. The government thereby impermissibly amended the indictment.[92]

Olis argues that reversal of his convictions is warranted because an objection at trial would have required acquittal since the government did not prove the charges alleged in the indictment but, instead, broadened the indictment such that he was convicted for a engagement partner at Arthur Andersen, James Hecker.[93] Olis' argument is based on two premises: (1) that instead of presenting evidence that Olis and his co-conspirators concealed material information from Dynegy's auditors, the government presented evidence that they concealed information from a single individual, James Hecker;[94] and (2) that instead of presenting evidence that the accounting treatment accorded Project Alpha violated GAAP, the government argued that it did not need to show that Project Alpha's accounting treatment violated GAAP, or that Olis and his co-conspirators intended the accounting treatment to violate GAAP.[95]

---

[92] *Id.*

[93] *Id.* at 82 n. 24.

[94] *Id.* at 75 asserting that "[t]he evidence at trial did not prove the allegations in the indictment. There was no proof . . . that Olis agreed to deceive Andersen-Dynegy's 'auditors.' "

[95] *Id.* (asserting that "[t]he evidence at trial did not prove the allegations in the indictment. There was no proof that Dynegy's accounting treatment violated GAAP or was improper

(Continued on following page)

(i) Theory of Liability

Olis argues that the government constructively amended the indictment at trial when the prosecutors

> sought to convict Olis based on a theory fundamentally different from the one presented in the grand jury's indictment. The grand jury charged Olis with seeking to obtain an incorrect accounting result and cause Dynegy to submit false information to its "auditors," the SEC and investors. At trial, the government abandoned this theory altogether, and made no effort to prove that Olis intended to submit or did submit false information to the EC and investors . . . [T]he government's bait-and-switch cannot stand – it violated Olis' Fifth Amendment rights, and requires reversal *per se*.[96]

As evidence that the government changed the fraud-on-Dynegy's auditors theory of liability alleged in the indictment to a fraud-on-Hecker theory evidenced at trial, Olis cites Hecker's testimony that "Dynegy nor any other company doesn't care what my opinion on accounting is individually. They want to know what Arthur Andersen['s] opinion is and Arthur Andersen's interpretation of generally accepted

---

because of the outside hedges or tear-ups, [or] that Olis intended to violate GAAP").

[96] *Id.* at 81-82.

accounting principles."[97] Missing from Olis' brief is any mention of Hecker's testimony that he was the Arthur Andersen engagement and audit partner who had "ultimate responsibility"[98] not only to "judge whether the transaction and the accounting proposed by the company [wa]s appropriate within the accounting rules that apply,"[99] but also to execute the SAS-50 opinion by signing "Arthur Andersen"[100] and thereby expressing Arthur Andersen's "agreement that Project Alpha could be reported as operating cash flow . . . in the financial statements of Dynegy for the year 2001."[101] Also missing from Olis' brief is any mention of Gene Foster's testimony (1) that he and his co-conspirators knew that without the SAS-50 opinion executed by Hecker, Dynegy would have reported the proceeds from Project Alpha as proceeds from financing activity instead of proceeds from operations,[102] (2) that they knew that if they disclosed

---

[97] *Id.* at 71 n. 21 (citing Hecker Testimony, T.Tr. Day 5, Docket Entry No. 102, p. 10:6-12).

[98] Hecker Testimony, T.Tr. Day 5, Docket Entry No. 102, p. 7:18.

[99] *Id.* at 7:23-25.

[100] *Id.* at 10:12 ("I signed the firm name, definitely.").

[101] *Id.* at 8:25-9:5:

> Q Basically the SAS-50 was the firm's acknowledgment or agreement that Project Alpha could be reported as operating cash flow on the financial, in the financial statements of Dynegy for the year 2001?
>
> A Yes, that was one of the important conclusions.

[102] When asked whether Dynegy needed Arthur Andersen's opinion in order to describe the $300 million realized from

(Continued on following page)

the outside hedges and tear-up agreements to Hecker he would not execute the SAS-50 opinion,[103] and (3) that they knew that by concealing the outside hedges and tear-up agreements from Hecker, they would prevent Project Alpha from being fully disclosed not just to Hecker but also to Arthur Andersen and others, including the credit rating agencies.[104]

Project Alpha as proceeds from operations in Dynegy's financial statements if Dynegy's internal accountants were satisfied with that accounting treatment, Foster responded that Dynegy "needed the Arthur Andersen opinion. It was required. It was my understanding that we had to have the SAS-50 opinion." T.Tr. Day 7, Docket Entry No. 104, p. 103:5-7.

[103] Foster explained that the way he and his co-conspirators "rationalized hiding these documents from [Arthur] Andersen, was that as long as the internal accountants were happy with it, it was our hope that ultimately the accounting would survive." T.Tr. Day 7, Docket Entry No. 104, p. 106:7-10.

[104] Foster testified that he and his co-conspirators knew that by failing to disclose the outside hedges and linked tear-ups to Hecker, they prevented Project Alpha from being fully disclosed not just to Hecker, but also to others, including the credit rating agencies:

> Q. Is it true that Alpha I was not fully disclosed to the credit rating agencies?
>
> A. Yes.
>
> Q. Explain.
>
> A. When you look at the financial statements, Alpha I, the Alpha transaction was shown as operating cash flow, and there was no disclosure in those financial statements to show as anything other than operating cash flow.
>
> Q. Is it your belief that if Mr. Hecker had known about the tear-ups, he would have required the

(Continued on following page)

Because the evidence presented at trial proved undisputedly that Hecker was the only Arthur Andersen employee with authority not only to judge the propriety of the accounting treatment accorded to Project Alpha, but also to sign Arthur Andersen's name to the SAS-50 opinion, which Dynegy needed to report Project Alpha's proceeds as proceeds from operations, and that Olis and his co-conspirators knew that by concealing the outside hedges and tear-up agreements from Hecker they would prevent Project Alpha from being fully disclosed not just to Hecker but also to Arthur Andersen and others, including the credit rating agencies, Olis' argument that the government constructively amended the indictment by proving fraud-on-Hecker instead of proving fraud-on-Dynegy's auditor, Arthur Andersen, has no merit. Business organizations like Arthur Andersen can only act through their employees, and acting in his official capacity, Hecker was Arthur Andersen for purposes of the accounting treatment accorded to Project Alpha. Accordingly, the court concludes that no constructive amendment occurred by virtue of the fact that the government presented evidence that Olis and his co-conspirators concealed the outside hedges and tear-up agreements from Hecker because this evidence did not broaden either

---

company to report Alpha as debt instead of operating cash flow?

A. Yes.

T.Tr. Day 7, Docket Entry No. 104, p. 19:7-18.

the theory of liability or the factual basis alleged in the indictment. *Young,* 730 F.2d at 223.

(ii) Failure to Prove Factual Allegations Olis argues that

> [t]he evidence at trial did not prove the allegations in the indictment. There was no proof that Dynegy's accounting treatment violated GAAP or was improper because of the outside hedges or tear-ups, that Olis intended to violate GAAP, or that Olis agreed to deceive Andersen-Dynegy's "auditors."
>
> As discussed, the government did not even attempt to argue that the outside hedges and linked tear-ups – to which Hecker objected – rendered Dynegy's accounting for Project Alpha wrong, or meant that the cash flows derived from Project Alpha should properly have been classified as income from financing. In fact the evidence demonstrated the opposite.[105]

After reciting evidence that he argues contradicts "the indictment's charges that [he] agreed to hide the outside hedges and tear-ups from Andersen as an institution and to disseminate false financial statements,"[106] Olis argues that "[t]he government could

---

[105] Olis' Points and Authorities, Docket Entry No. 315, pp 75-76.

[106] *Id.* at 78.

not have convicted [him] of the charges in the indictment."[107]

Olis' argument that the government constructively amended the indictment by failing to prove all of the factual allegations contained therein is an argument that the Supreme Court rejected in *Miller*, 105 S.Ct. at 1811. Miller had been indicted for various allegedly fraudulent acts associated with a burglary at his place of business, including consenting to the burglary and lying to his insurer about the value of his loss. *Id.* at 1813. At trial, the prosecution submitted evidence only as to the latter alleged fraud and submitted no proof whatsoever as to the theory that he had consented to the burglary. *Id.* While the proof clearly supported the jury's finding that Miller was guilty of the one act that was both alleged in the indictment and litigated at trial, Miller nonetheless complained "not that the indictment failed to charge the offense for which he was convicted, but that the indictment charged more than was necessary" and, thus, that the government was required to prove all that had been alleged. *Id.* at 1817. The Court rejected that argument, ruling that "[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment

---

[107] *Id.*

alleges more crimes or other means of committing the same crime." *Id.* at 1815.

In rejecting Miller's challenge the Court acknowledged the distinction between an amendment of the indictment that *broadens* its scope and one that *narrows* its scope. *Id.* at 1818. The Court clarified that while no one other than the grand jury is permitted to broaden the scope of an indictment, there is no prohibition against narrowing the indictment at trial.

> Modern criminal law has generally accepted that an indictment will support each offense contained within it. To the extent that [*Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)] stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition, although . . . we do not limit *Bain'* s more general proposition concerning the impermissibility of actual additions to the offenses alleged in an indictment, a proposition we have repeatedly reaffirmed.
>
> An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. But here there was no alteration of the indictment, nor did the court's action, in effect, add anything to it by submitting to the jury matters which it

> did not charge . . . [W]here an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment. Were the rule otherwise, the common practice of withdrawing from the jury's consideration one count of an indictment while submitting others for its verdict . . . would be a fatal error.

105 S.Ct. at 1819-20 (citations omitted). Pursuant to *Miller* the government had the right to narrow the indictment by presenting only the evidence necessary to prove the essential elements of the crimes charged; the inclusion of additional facts in the indictment did not obligate the government to prove them.

The scheme to defraud alleged and proved in this case did not turn on whether the treatment accorded to Project Alpha in Dynegy's financial statements technically complied with GAAP or whether Olis and his co-conspirators intended to violate GAAP but, instead, on whether the defendants' disclosures about Project Alpha intentionally omitted material facts that caused Dynegy's financial statements to be materially false and misleading. *See United States v. Rigas,* 490 F.3d 208, 221 (2d Cir.2007), *cert. denied,* ___ U.S. ___, 128 S.Ct. 1471, 170 L.Ed.2d 296 (2008) ("Even if [d] efendants complied with GAAP, a jury could have found, as the jury did here, that [d]efendants intentionally misled investors . . . "); *United States v. Ebbers,* 458 F.3d 110, 125-26 (2d Cir.2006),

cert. denied, ___ U.S. ___, 127 S.Ct. 1483, 167 L.Ed.2d 244 (2007) (explaining that the issue in relation to allegedly false financial reports is not whether an argument could be made that the accounting was permissible under particularized rules, but whether the use of the accounting rules led to a financial statement that was materially misleading, and recognizing that materially misleading financial statements violate GAAP).

As in *Rigas* and *Ebbers*, the government did not need to prove that Dynegy's accounting for Project Alpha violated GAAP in order to prove that Dynegy's financial statements were materially false and misleading because Olis and his co-conspirators intentionally concealed material information from Arthur Andersen and others. Thus, the government did not constructively amend the indictment by telling the jury that Olis could be convicted regardless of whether the accounting treatment accorded to Project Alpha violated GAAP, that Olis and his co-conspirators intended to violate GAAP, or that Hecker's application of GAAP to Project Alpha was correct. *See Miller*, 105 S.Ct. at 1815 ("[a] part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored'").

Olis' conclusion that "[t]he government could not have convicted [him] of the charges in the indictment," does not support his claim that the government constructively amended the indictment but, instead, restates the sufficiency of the evidence

argument that he raised and the Fifth Circuit rejected on direct appeal:

> Olis contends, almost perfunctorily, that the evidence does not support his conviction. In particular, he disputes the proof that he conspired to conceal two critical features of Project Alpha from Dynegy's outside auditor Arthur Andersen – the "parent level" hedge and the "tear-up" agreements. This court will not disturb a jury's verdict unless the record demonstrates that a rational jury could not have found each of the elements of the offense beyond a reasonable doubt. *United States v. Dahlstrom,* 180 F.3d 677, 684 (5th Cir.1999) . . .
>
> Olis asserts that the evidence demonstrated that everyone working on Project Alpha, including Arthur Andersen accountants, knew that the bank owners of ABG Gas were fully hedged against the risk of loss from variable gas prices. Olis's boss Foster, testified, however, as a star prosecution witness and co-indictee, that he and Olis wrongly agreed to the tear-ups and the parent hedge and hid them from Arthur Andersen. Jim Hecker, an audit partner at Arthur Andersen, testified that he advised Dynegy against tear-ups, and Dynegy subsequently did not reveal this aspect of Project Alpha to him. A reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating emails among Olis and his co-indictees and a wealth of other evidence,

> could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes.

Olis, 429 F.3d at 542-43.[108]

(4) Conclusions

For the reasons explained above, the court concludes that the government did not constructively amend the indictment by changing the theory of liability or by failing to prove that the accounting treatment accorded to Project Alpha violated GAAP and that Olis and his co-conspirators intended to violate GAAP. Because the government did not constructively amend the indictment, Olis' trial counsel did not render constitutionally inadequate assistance of counsel by failing to object on this basis.

(b) Biased Juror

Olis argues that the assistance of counsel he received both at trial and on appeal was constitutionally ineffective because his counsel failed to

---

[108] As recognized by the Fifth Circuit, any doubt that Olis and his co-conspirators conspired to conceal the outside hedges and tear-up agreements from Arthur Andersen and others in an effort to prevent Project Alpha from being fully disclosed is dispelled by Foster's testimony that the co-conspirators actively sought to prevent documents from the Project Alpha operations manual from being distributed even to other Dynegy employees for fear that they would fall into the hands of Arthur Andersen. See e-mail messages circulated among co-conspirators described above at p. 2 n. 1.

object to or appeal from the seating of an admittedly biased juror, and the court's ex parte communications with that juror.

(1) Factual Background

Olis asserts that at the end of the first day of trial a juror informed the court that the trial schedule could pose an obstacle to the juror's obligation to pick up her daughter from school. The court told counsel that he had discussed the issue with the juror and thought that the issue had been worked out.[109] However, after testimony resumed the next day, the court informed counsel during a sidebar conference out of Olis' presence that the same juror had sent the court a note in which she stated:

> I am sorry to inform you that I will not be able to judge this case fairly, knowing that my boss will not pay me for missed days and how my child will be getting home from school, because my income is the main source for my household. So, it is not fair for all that I remain on the jury. So, I am asking you to please dismiss me from this case.[110]

Suggesting that the $40 per day stipend paid to the juror was likely in the range of the juror's daily income, the court proposed that the juror remain on the panel and be paid weekly. Olis' counsel stated

---

[109] T.Tr. Day 1, Docket Entry No. 122, p. 111:3-16.

[110] T.Tr. Day 2, Docket Entry No. 97, pp. 121:23-122:4.

that this arrangement was "acceptable with the defense."[111] When the government indicated some concern with the court communicating ex parte with the juror, the court explained its reasons:

> Certainly you're supposed to be careful. The problem is sometimes if you bring the juror into the courtroom, we can't close the courtroom, so all the spectators would be here and all the attorneys would be here. It has a high level of embarrassment about a personal, financial and family matter. So, my normal procedure is to talk to the juror, find out what the facts are, communicate with counsel, get counsel's concurrence, and then communicate back.
>
> In certain situations if I think the juror has potentially been tainted from an outside source, I will bring the juror in and have a question and answer in the courtroom. But I prefer to start on this basis. So, you – all do your research, I'll look at mine.
>
> I'm comfortable that this procedure is appropriate, but I understand you've got a lot invested in this case and want to be careful, so that's fine.[112]

During another sidebar conference held later that day, all counsel agreed that the court should communicate to the juror ex parte the decision that

---

[111] *Id.* at 122:14.

[112] *Id.* at 123:1-16.

she remain on the panel. After that ex parte communication occurred, the court informed counsel that the juror had stated her daily income as $80 per day, and that the court had suggested she ask her boss to make up the difference. Although the court reported that the juror was not happy with that outcome, the juror remained on the panel through the verdict.[113]

(2) Analysis

(i) Juror Bias

Citing *United States v. Hughes,* 258 F.3d 453, 459 (6th Cir.2001), Olis argues that

> where a juror makes an "open declaration of her inability to be fair," and neither the court nor counsel makes "any attempt at clarification or rehabilitation, there is no ambiguity in the record as to her bias; [the juror's] express admission is the only evidence available to review."[114]

Citing in addition, *Virgil v. Dretke,* 446 F.3d 598 (5th Cir.2006), and *United States v. Nell,* 526 F.2d 1223 (5th Cir.1976), Olis argues that courts have reversed convictions by juries that included one or more people who had expressly confessed bias.[115]

---

[113] *Id.* at 223:18-225:7.

[114] Olis' Points and Authorities, Docket Entry No. 315, p. 90.

[115] *Id.*

In *Hughes* a juror stated that because her nephew was a police officer and she knew other officers, "I don't think I could be fair." 258 F.2d at 456. In *Virgil* one juror stated that "his relationship with law-enforcement officers would preclude him from serving as an impartial juror," and another stated that because his mother had been mugged, he could not be "fair and impartial" in a case involving an assault on an elderly person. 446 F.3d at 609-10. In *Nell* – a case involving unions – one juror stated that he was biased because he disliked unions, and another generally disclosed a possible association with the defendant. 526 F.2d at 1227-29. "Both the Sixth Circuit in *Hughes,* and this Court, in *Nell,* found it telling that neither venireperson ever stated that they would be able to render a fair and impartial verdict." *Virgil,* 446 F.3d at 607. Olis argues that the facts of these cases are similar to those of this case because "in each case neither counsel nor the trial court rehabilitated the jurors or otherwise made any substantial efforts to assure that the jurors could set aside their biases and judge the case fairly."[116] Olis argues that "the inclusion of the admittedly biased juror on [his] panel violated his Sixth Amendment right to an impartial jury,"[117] and that counsel's failure to object to the inclusion of an admittedly biased juror constitutes ineffective assistance.[118]

---

[116] *Id.*

[117] *Id.* at 91.

[118] *Id.* at 93.

The right of a defendant to a fair and impartial jury is a fundamental element of due process. *Id.* at 605. In *Virgil* the Fifth Circuit held that permitting admittedly biased jurors to convict the defendant deprived him of his Sixth Amendment right to a fair trial by an impartial jury, and that counsel's failure to challenge these jurors for cause amounted to deficient performance that was presumptively prejudicial. *Id.* at 608-14. However, the court did not find ineffectiveness with regard to the failure to remove jurors whose answers, considered in context, did not evidence bias against the defendant or the circumstances of his particular case. *Id.* at 609. In *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Supreme Court stated the test for determining juror bias is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality." *Id.* at 1643 (citing *United States v. Reynolds,* 98 U.S. 145, 155, 25 L.Ed. 244 (1878) ("The theory of the law is that a juror who has formed an opinion cannot be impartial."). While jurors may also be found to have implied bias, such a finding must be premised upon a conclusion about which reasonable jurists would not disagree. *Brooks v. Dretke,* 444 F.3d 328, 329 n. 4, and 332 (5th Cir.2006).

Olis has neither alleged that the juror at issue was incapable of basing her decision upon the evidence presented at trial nor pointed to specific facts demonstrating such a close connection to the circumstances of his case that bias must be

presumed. The venire as a whole was asked several times whether they could return a verdict based solely on the evidence in this case.[119] The juror in question did not indicate that she had any predisposition to convict Olis, and despite his argument to the contrary, Olis has not shown that the juror possessed a bias that would have prevented her from serving on the jury had his counsel objected. The issue before the court is, therefore, vastly different from that at issue in *Virgil* and the other cases on which Olis relies. In those cases jurors who admitted bias related to the circumstances of the case at hand were permitted to serve on the jury that convicted the defendants after counsel and the court failed to ask follow-up questions to clarify or rehabilitate the jurors' expressions of bias during voir dire. *See Virgil,* 446 F.3d at 607 (observing that "[b]oth the Sixth Circuit in *Hughes,* and this Court, in *Nell,* found it telling that neither venireperson ever stated that they would be able to render a fair and impartial verdict").

Citing *Turner v. Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), and *United States v. Maxwell,* 160 F.3d 1071 (6th Cir.1998), Olis argues that the Supreme Court has long recognized that a verdict is void if jurors develop biases during the course of the trial. However, in these cases, too, the

---

[119] T.Tr. Day 1, Docket Entry No. 122, pp. 16:6-12, 31:12-18, 47:14-48:2, and 67:1-24.

bias at issue was specifically related either to the defendant or to the circumstances of the defendant's particular case. In *Turner* the Supreme Court held that the defendant had been deprived of his right to a fair trial by an impartial jury because two deputy sheriffs who testified as key state witnesses not only had charge of the jury during the threeday trial but also fraternized with the jury outside the courtroom while acting in their official capacities. 85 S.Ct. at 550. In *Maxwell* the defendant's mother testified on her son's behalf, and after the close of evidence a juror informed the court that he knew the defendant's mother because he was her mail carrier. The next morning the court addressed the matter by conducting a separate voir dire of the juror during which it was determined that the juror could not remain fair and impartial in deciding the case. The court allowed the juror to return to the jury box but designated him an alternate and dismissed him from participating in jury deliberations. 160 F.3d at 1076-77.

The facts of this case are starkly different from the facts in either *Turner* or *Maxwell*. The juror at issue in this case is not alleged to have known any of the witnesses or to have had any inappropriate contact or communication with outside sources during the trial. The juror merely expressed concern that the trial schedule would prevent her from picking her child up from school and that the stipend paid to jurors was less than her daily income. These concerns alone are not sufficient to show either that the juror was biased against Olis or that her service on the jury

prejudiced him. Concerns about childcare and income are pressures commonly experienced by jurors that cannot properly be characterized as bias against any particular party or bias related to the circumstances of any particular case. Nor do these concerns reflect an inability to decide the case solely on the evidence presented at trial. For these reasons it cannot be said that counsel's failure to object to this juror's service on Olis' jury deprived Olis of a fair trial with a reliable result. Absent evidence that anything changed between the voir dire during which the juror indicated her ability to be fair and impartial and to decide the case strictly on the evidence presented at trial and her expression of concern regarding childcare and income to the court, the court is not persuaded either that Olis' trial and/or appellate counsel's performance fell below an objective standard of reasonableness or that counsel's performance prejudiced Olis by depriving him of a fair trial with a reliable result. *See Suarez v. Bennett,* 171 Fed.Appx. 361 (2d Cir.2006) (state court's decision to retain juror who had a family obligation on the evening of the deliberations fell within the boundaries established by *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982), with respect to impartiality).

(ii) Ex Parte Communications

Olis argues that his

> counsel's response to the biased juror issue was deficient for another reason: without seeking an informed waiver from Olis,

> counsel permitted the Court to conduct a critical stage of the proceedings out of the presence of both Olis and his counsel. Such *ex parte* conduct of critical proceedings violated Olis' due process and Sixth Amendment rights to be personally present and to have assistance of counsel, and counsel's acquiescence was therefore constitutionally ineffective.[120]

A criminal defendant's constitutional right to be present at various stages of his trial is rooted in the Confrontation Clause of the Sixth Amendment and, when confrontation is not at issue, the Due Process Clause of the Fifth Amendment. *See United States v. Gagnon,* 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). In addition, Federal Rule of Criminal Procedure 43 provides that a defendant must be present at "every trial stage," Fed.R.Crim.P. 43(a)(2), except those stages where "[t]he proceeding involves only a conference or hearing on a question of law." Fed.R.Crim.P. 43(b)(3).

In *Gagnon* the Supreme Court reviewed a court's private *in camera* conference with a juror after the juror had expressed concern that one of the defendants, Gagnon, had been seen sketching the jury during trial. 105 S.Ct. at 1483. After the sketch had been brought to the court's attention, the court announced that he would speak to the juror. *Id.* The court did so on the record in chambers in the presence

---

[120] Olis' Response, Docket Entry No. 349, p. 40.

of Gagnon's counsel but outside the presence of Gagnon and his co-defendants. On appeal, Gagnon and his co-defendants claimed that the *in camera* meeting with the juror violated their rights to be present at all stages of trial. *Id.* A divided panel of the Ninth Circuit Court of Appeals reversed the convictions of all the defendants holding that the *in camera* discussion with the juror violated their rights under Rule 43 and the Due Process Clause of the Fifth Amendment. *Id.* at 1484 (citing *United States v. Gagnon,* 721 F.2d 672 (1983)). Concluding that the defendants' rights under the Fifth Amendment Due Process Clause were not violated by the district court's *in camera* discussion with the juror, the Supreme Court reversed the Ninth Circuit's contrary holding. Observing that "[t]he mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right," *id.* (quoting *Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 459, 78 L.Ed.2d 267 (1983) (Stevens, J. concurring)), the Court explained that "a defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge [, and that t]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *Id.* (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 332 and 333, 78 L.Ed. 674 (1934)). The Court also cautioned that "the exclusion of a defendant from a. trial proceeding should be considered in

light of the whole record." *Id.* (citing *Snyder,* 54 S.Ct. at 335).

Olis argues that

> unlike in *Gagnon* – where there was never any real suggestion of bias and the record firmly established that the juror was not biased – *Virgil, Hughes,* and *Nell* establish beyond cavil that a juror's direct expression of bias raises a presumption that the juror is, in fact, biased. And since a defendant has a constitutional right to be tried by an impartial jury, see U.S. Const. amend. VI, *Virgil,* 446 F.3d at 605, a conference to explore an overt expression of bias relates directly to the question whether the defendant may be constitutionally tried by the jury as presently empaneled. Thus, a conference with a juror who has overtly expressed bias bears a substantial relation to a defendant's opportunity to defend against the charge . . . Olis had a right to be present, and to have his counsel present, at the Court's conference with the biased juror. Counsel's failure to vindicate these rights constituted ineffective assistance of counsel.[121]

The Due Process Clause only guarantees a defendant the right to be present at a given stage of his trial to the extent that a fair and just hearing

---

[121] *Id.* at 42.

would be thwarted by his absence. *See Snyder* 54 S.Ct. at 332-33. As the Supreme Court observed in *Gagnon,* the encounter between the court and the juror in this case was "a short interlude in a complex trial; the conference was not the sort of event which every defendant had a right personally to attend under the Fifth Amendment." 105 S.Ct. at 1484. Had Olis and counsel for both sides been present, they could not have assisted. Indeed, for the reasons explained by the court on the record,[122] their presence may have prevented the juror from speaking openly. Olis' absence from the court's sidebar conferences with counsel, at which the court conferred with counsel about how best to proceed in light of the juror's comments, similarly had no adverse effect on Olis or the fairness of the trial. These sidebar conferences were more akin to hearings on an issue of law to which a defendant has little to contribute, than to stages of trial at which a defendant has a due process or statutory right to be present. In sum, the court's ex parte communications with a juror, followed by sidebar conferences with counsel for both sides effected neither a violation of Olis' rights to due process nor a violation of rights protected by Federal Rule of Criminal Procedure 43. Accordingly, neither the failure of Olis' trial counsel to object to the court's ex parte communications with the juror nor the failure of Olis' appellate counsel to raise this error on direct appeal reflect attorney performance that fell below an

---

[122] T.Tr. Day 2, Docket Entry No. 97, 123:1-16.

objective standard of reasonableness, or prejudiced Olis by depriving him of a fair trial with a reliable result.

(c) Erroneous Jury Instructions

Olis argues that his trial and appellate counsels' representation was constitutionally ineffective because they failed either to object to or to appeal from the court's erroneous instruction to the jury concerning the mail and wire fraud counts. With regard to the wire fraud counts Olis argues that the court incorrectly instructed the jury that the government did not need to prove that the material transmitted by wire was itself false or fraudulent,[123] and with regard to the mail and wire fraud counts Olis argues that the court incorrectly defined "scheme to defraud" as "any scheme to deprive another of money or property."[124] Olis argues that

> [t]hese failures prejudiced Olis because the government's course of proof was not sufficient to demonstrate guilt under the proper legal standards. Moreover, the legal infirmities in the mail and wire fraud convictions

---

[123] Olis' Points and Authorities, Docket Entry No. 315, pp. 96-98.

[124] *Id.* at 98 (citing T.Tr. Day 8, Docket Entry No. 105, pp. 30:7-9 and 32:8-10).

infects the other counts as well, and reversal is required on all counts.[125]

(1) Falsity of Material Transmitted by Wire

Relying on *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and *United States v. Curry,* 681 F.2d 406 (5th Cir.1982), Olis contends that his convictions on the three wire fraud counts (Counts Four through Six) must be set aside because his trial counsel rendered constitutionally inadequate assistance by failing to object when the court erroneously instructed the jury "[i]t is not necessary that the government prove . . . that the material transmitted by wire was itself false or fraudulent."[126] Olis argues that the court gave this instruction in error because the wire fraud counts in this case are based on the filing of two Form 10-Qs and one Form 10-K, documents which Hecker testified Dynegy was required by law to file electronically with the Securities and Exchange Commission (SEC). Acknowledging that the government is not "[g]enerally . . . required to prove that the mailed or wired material was itself false or fraudulent,"[127] Olis argues

---

[125] *Id.* at 96.

[126] *Id.* (citing T.Tr. Day 8, Docket Entry No. 105, p. 32:21-24).

[127] Olis' Response, Docket Entry No. 349, p. 44.

> that general principle is subject to an important caveat. The "*Parr* exception" holds that when a statement is required by law to be mailed or wired, then that statement cannot form the basis of a fraud conviction unless it is actually false or fraudulent. *United States v. Curry,* 681 F.2d 406, 412 (5th Cir.1982) ("mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme") (citing *Parr v. United States,* 363 U.S. 370, 390-91, 80 S.Ct. 1171, 1183-84, 4 L.Ed.2d 1277 (1960)).[128]

In *Parr* the Supreme Court held that members of a school board could not be held liable for mail fraud based on mailings that were required under state law unless the mailings were false or fraudulent. 80 S.Ct. at 1171. In *Curry* the Fifth Circuit relied on *Parr* to hold that the defendant could not be convicted of mail fraud based on affidavits that he mailed pursuant to Louisiana's statute governing campaign-finance disclosure unless the government proved that the affidavits were false and that the defendant either intended to defraud the state agency to which they were mailed or mailed them "in a deliberate attempt to prevent discovery of his scheme to defraud." 681 F.2d at 412. *See also United States v. Krenning,* 93 F.3d 1257, 1263 (5th Cir.1996) (recognizing that the

---

[128] *Id.* at 44-45.

Parr exception "applies only where the mailings are both not themselves false or fraudulent, and their mailing is required by law"). In *United States v. Bright,* 588 F.2d 504, 509 (5th Cir.), *cert. denied,* 99 S.Ct. 1537 (1979), the Fifth Circuit held that the "innocent mailings" exception established by *Parr* does not apply where the legal requirement to make the mailings is triggered by the fraudulent scheme. *Id.* at 509-10 ("If [the defendants] had not decided to defraud the estate of their late cousin, they would not have had to comply with the state law requiring them to file the creditors' notice."). *See also Schmuck v. United States,* 489 U.S. 705, 109 S.Ct. 1443, 1449 n. 7, 103 L.Ed.2d 734 (1989) (distinguishing *Parr* by noting that the mailing of the tax documents "would have been made regardless of the defendants' fraudulent scheme," whereas the mailings at issue were "derivative" of Schmuck's fraudulent scheme and "would not have occurred but for that scheme").

Since it is undisputed that Dynegy was required by law to file with the SEC the 10Q and 10K forms on which the wire fraud charges are based regardless of the defendant's scheme to defraud, the court erroneously instructed the jury that "[i]t is not necessary for the government to prove ... that the material transmitted by wire was itself false or fraudulent." Under the specific facts of this case, the government was required to show that the 10Q and 10K forms that Dynegy submitted electronically to the SEC were false or fraudulent. However, assuming without deciding that Olis' trial and appellate counsel

unreasonably failed either to object to this erroneous instruction at trial or to raise it on direct appeal, Olis is not entitled to relief because he has failed to show either that the 10Q and 10K forms at issue were not false or fraudulent or that he was prejudiced.

In this case the government alleged that Olis and his co-conspirators devised and executed a scheme to defraud based on the characterization of proceeds from Project Alpha in Dynegy's financial statements as proceeds from operations, i.e., risk-management activities, instead of proceeds from financing activities. The government also alleged that Olis and his coconspirators knew and intended

> that Dynegy would and did falsely report to the SEC, Rating Agencies, lenders, market and securities analysts, and the investing public, by means of electronic filing of Quarterly Reports ("Forms 10-Q") and an Annual Report ("Form 10-K"), that approximately $300,000,000 of "cash flows from financing activities" were "cash flows from operating activities," or more specifically, "cash flows from Risk-management activities," throughout the last 9 months of the year 2001.[129]

Although Olis has argued that the accounting treatment accorded to Project Alpha in Dynegy's financial statements was not false and fraudulent because it did not violate GAAP, the government's

---

[129] Indictment, Docket Entry No. 1, p. 11 ¶ 21.

contention that the financial statements were false and fraudulent was not based on GAAP violations but, instead, on the co-conspirators' concealment of the outside hedges and tear-up agreements. Evidence that Dynegy's financial statements were false and fraudulent due to the co-conspirators' failure to fully disclose Project Alpha was overwhelming.[130] Moreover, as explained in the jury instructions, Olis' defense to the charges alleged in the indictment was not that the proceeds from Project Alpha were truthfully and accurately reported in Dynegy's financial statements but, instead, that

> he did not intentionally and knowingly employ a deceptive device or contrivance or engage in a conspiracy to defraud Dynegy's auditor, Arthur Andersen, L.L.P., or any other person or entity as alleged in the indictment because . . . he followed the advice of Arthur Andersen, L.L.P., which had knowledge and permitted the use of the hedges to protect the 3% equity in each of the Special Purpose Entities; and that he followed the advice of Vinson & Elkins in including the tear-up language in amendments.[131]

---

[130] This evidence includes but is not limited to incriminating e-mail messages circulated among the co-conspirators. See p. 2 n. 1, above.

[131] Jury Instructions, Docket Entry No. 90, p. 13.

See Olis, 429 F.3d at 542 (describing Olis' defense at trial as being that "everyone working on Project Alpha, including Arthur Andersen accountants, knew that the bank owners . . . were fully hedged against the risk of loss from variable gas prices"). Accordingly, the court concludes that Olis suffered no prejudice from the failure of his counsel either to object to the court's erroneous instruction at trial or to raise this issue on appeal.

(2) Definition of "Scheme to Defraud"

Olis argues that the court's instructions for the mail and wire fraud counts (Counts Three through Six) incorrectly defined "scheme to defraud" as "any scheme to deprive another of money or property."[132] Olis argues that this instruction was incorrect and highly prejudicial because "no evidence was presented at trial that Olis or his alleged co-conspirators intended to obtain money or property. Rather, the government attempted simply to show that investors were harmed when they purchased Dynegy stock."[133] Citing *Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 374, 148 L.Ed.2d 221 (2000), and *McNally v. United States,* 107 S.Ct. 3875, 3881 (1987), Olis argues that the jury instructions improperly deleted the "obtaining" element and permitted the jury to

---

[132] Olis' Points and Authorities, Docket Entry No. 315, p. 98.

[133] *Id.* at 98.

convict by finding a scheme simply to deprive another of property, but that "deprivation is a necessary, but not a sufficient, condition of mail and/or wire fraud because "only a scheme to obtain money or other property from the victim of fraud violates the [mail and wire fraud] statutes."[134]

The court is not persuaded that Olis' trial and/or appellate counsel rendered constitutionally ineffective assistance by failing to object to the definition of "scheme to defraud" about which Olis complains. Olis does not argue that the court incorrectly instructed the jury on the elements of either the offense of mail fraud or wire fraud but only that its explanatory statement that "[a] 'scheme to defraud' *includes* any scheme to deprive another of money or property by means of a false or fraudulent pretense, representation, or promise" erroneously failed to advise the jury that the alleged "scheme to defraud" had to be a scheme to *obtain* money or property.

When the court instructed the jury on the charge of conspiracy to commit securities fraud, mail fraud, or wire fraud, the court explained that the indictment alleged the defendant and at least one other person made an agreement to commit the crime of securities fraud, mail fraud, or wire fraud as charged in the indictment, and that the indictment alleged the following objects or purposes of the agreement:

---

[134] Olis' Response, Docket Entry No. 349, p. 48 (quoting *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir.1993)).

> (A) To knowingly devise and intend to devise a scheme and artifice to defraud, and *for obtaining money* by means of false and fraudulent pretenses, representations, and promises, and to knowingly use and cause to be used the United States mails . . . in violation of Title 18, United States Code, Section 1341; AND
>
> (B) to knowingly devise and intend to devise a scheme and artifice to defraud, and *for obtaining money* by means of false and fraudulent pretenses, representations, and promises, and to knowingly transmit and cause to be transmitted by means of wire . . . for the purpose of executing such scheme or artifice, in violation of Title 18, United States Code, Section 1343.[135]

Thus, the court correctly described the offenses of mail fraud and wire fraud alleged in the indictment as schemes for obtaining money by false and fraudulent pretenses. The explanatory language about which Olis complains comes straight out of the Fifth Circuit Pattern Jury Instructions, *see* 2001 Fifth Circuit Criminal Jury Instructions § 259 (mail fraud) and § 2.60 (wire fraud), and Olis has not cited any authority holding that it misstates the law.[136] *See*

---

[135] Jury Instructions, Docket Entry No. 90, pp. 11-12 (emphasis added). See also T.Tr. Day 8, Docket Entry No. 105, p. 22:19-23:8.

[136] Olis cites *United States v. Svete*, 521 F.3d 1302, 1310 (11th Cir.2008), for its holding that the Eleventh Circuit pattern jury instructions concerning the "scheme to defraud" element of

(Continued on following page)

United States v. Klein, 543 F.3d 206, (5th Cir.2008) (court did not err by giving definition of "scheme to defraud" that was substantially similar to one in the Fifth Circuit pattern jury instruction, which did not mislead jury or impair the defendant's ability to present a particular defense).

Olis argues that his counsels' failure to object to the inclusion of this language in the jury instructions prejudiced him because it relieved the government from having to "prove that Olis intended to obtain any money or property."[137] This argument is merely an attempt to reassert the sufficiency of the evidence argument that was raised and rejected on direct appeal. *See Davis v. United States,* 417 U.S. 333, 94 S.Ct. 2298, 2304-05, 41 L.Ed.2d 109 (1974) (a § 2255 motion may not be used to relitigate an issue that was raised and considered on direct appeal without some highly extraordinary circumstances, such as an intervening change in the law); *United States v. Webster,* 392 F.3d 787, 791 (5th Cir.2004) (issues that were raised and rejected on direct appeal are barred from consideration on collateral review).[138] Olis does

---

mail fraud was deficient and incorrect under established circuit precedent. However, the Eleventh Circuit has since vacated that panel opinion and granted rehearing en banc. *See United States v. Svete,* 532 F.3d 1133 (11th Cir.2008).

[137] Olis' Response, Docket Entry No. 349, p. 49.

[138] The United States observes that evidence presented at trial showed that the scheme alleged in the indictment was a scheme for Dynegy, through Olis and his co-conspirators, to obtain money by avoiding an increase in its cost of borrowing in

(Continued on following page)

not argue or make any showing that the instruction about which he complains impaired his ability to present a particular defense or to argue that the government had not established his intent to defraud beyond a reasonable doubt. Indeed, during closing argument, Olis' counsel expressly argued, "You know, when you think of fraud, you think somebody is getting some money, you know. And who got the money? Arthur Andersen. I'll tell you, Arthur Andersen did their dirty tricks, not Jamie Olis."[139]

Because the court's instructions to the jury correctly described the crimes of mail and wire fraud alleged in this case as "a scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, representations, and promises,"[140] because the explanatory statement about which Olis complains is a correct statement of the law that appears in the Fifth Circuit's Pattern Jury Instructions, and because Olis makes no showing that the explanatory statement about which he complains impaired his ability either to argue that the government had not proved each element of the mail and

---

relation to its energy trading activities, and was also intended to deprive others of money by inflating the value of Dynegy's stock. United States' Memorandum, Docket Entry No. 346, pp. 58, 76-79.

[139] T.Tr. Day 8, Docket Entry No. 105, p. 73:1-4.

[140] Jury Instructions, Docket Entry No. 90, pp. 11-12 (emphasis added). See also T.Tr. Day 8, Docket Entry No. 105, pp. 22:19-23:8.

wire fraud offenses beyond a reasonable doubt or to present his defense, the court is not persuaded that the failure of his trial counsel to object to this explanatory statement or his appellate counsel to raise this issue on direct appeal reflect attorney performance that fell below an objective standard of reasonableness or prejudiced him such that he was deprived of a fair trial with a reliable result.

(d) Failure to Take Other Necessary Steps

Olis argues that his trial counsel's representation was constitutionally ineffective because he failed to take other steps necessary to mount an adequate defense, i.e., purchase a searchable database program to facilitate discovery review, hire a jury consultant, and retain expert witnesses to rebut Heil's testimony regarding losses caused by Project Alpha and to supply vital accounting expertise.

The record does not demonstrate that trial counsel's representation fell below the threshold of reasonableness. Olis' trial counsel pursued a three-pronged strategy aimed at countering the government's evidence of intent to defraud. First, trial counsel urged the jury to find Olis not guilty because the government had not proved beyond a reasonable doubt that he possessed the intent to defraud anyone. Second, trial counsel sought and received an advice-of-counsel jury instruction and urged the jury to find Olis not guilty because all of his acts had been

undertaken in good faith reliance on the advice that he had received from accountants and attorneys. Third, trial counsel worked to discredit the testimony of the government's star witnesses, Foster and Olis. To discredit Foster, trial counsel cross-examined him about discrepancies between the testimony he gave before the SEC and the testimony he gave in this trial, and the reasons for which he decided to plead guilty (i.e., pressures caused by his being the bread-winner for a family of seven children). To discredit Hecker, trial counsel cross-examined him about the fees that Arthur Andersen earned as a result of Project Alpha not just from representing Dynegy but as an equity partner of another entity involved in the transaction. A review of the record establishes that even if trial counsel had taken the steps that Olis now argues should have been taken, the result would have been the same.

As the Fifth Circuit Court of Appeals recognized in affirming Olis' conviction, "[a] reasonable jury, basing its conclusion on the testimony of Foster and Hecker, together with the incriminating emails among Olis and his co-indictees and a wealth of other evidence, could easily have found Olis guilty beyond a reasonable doubt of all the charged crimes." *Olis*, 429 F.3d at 543. Since Olis fails to demonstrate that taking the extra steps that he now argues his trial counsel should have taken would have allowed them to do a better job of refuting and/or discrediting the testimony of Foster and Hecker, or would have allowed them to refute any of the incriminating e-mails

exchanged with his co-conspirators, some of which the government used to prove the element of intent, the court is not persuaded that Olis has shown either that his trial counsels' failure to take these extra steps fell below an objective standard of reasonableness or prejudiced Olis such that he was deprived of a fair trial with a reliable result.

3. *Conclusions*

For the reasons explained above, the court is not persuaded that Olis has established that the representation provided to him by either his trial or his appellate counsel fell below an objective standard of reasonableness or prejudiced Olis such that he was deprived of a fair trial with a reliable result.

V. *Olis' Motion for Reconsideration*

Asserting that "all of Olis' claims are meritorious, and in no instance do the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the [government] is entitled to judgment as a matter of law,"[141] and that he "is entitled to discovery to support

---

[141] Olis' Response, Docket Entry No. 349, pp. 53-54.

his claims,"[142] Olis asks the court to "reconsider its denial of Olis' motion for discovery (Docket # 327)."[143]

"The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Schrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir.1995). *See also Eisemann v. Greene*, 204 F.3d 393, 395 n. 2 (2d Cir.2000) (per curiam) (to be entitled to reconsideration a party "must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion"). The high burden imposed on parties seeking reconsideration has been established to discourage litigants from making repetitive arguments on issues that have already been considered by the court, to ensure finality, and to prevent the practice of a losing party examining a decision and then plugging the gaps of the lost motion with additional matters. Petitioner may neither repeat arguments already briefed, considered, and decided, nor advance new facts, issues, or arguments that could have been presented. *See In re Application of the United States for An Order*, 396 F.Supp.2d 294, 301 (E.D.N.Y.2005).

---

[142] *Id.*

[143] *Id.*

The court has allowed the parties extraordinary leeway in submitting lengthy briefs and other written materials in connection with Olis' § 2255 motion. As indicated by the length of both this Memorandum Opinion and Order and the March 3, 2008, Memorandum Opinion and Order in which the court denied Olis' motion for discovery (Docket Entry No. 344), the court has expended considerable time reading these papers and performing a significant amount of independent research to be as fully informed as possible when addressing Olis' claims and the parties' arguments. Yet, without disputing either the legal standard that the court applied in ruling on his motion for discovery or the reasons for which the court denied that motion, Olis ends his response in opposition to the government's motion for summary disposition of his § 2255 motion with a cursory, one-line request for reconsideration of the court's decision to deny his motion for discovery. Since Olis has not argued that the court applied the wrong legal standard in ruling on his motion for discovery and has not made any showing from which the court could conclude that he needed discovery to respond to the government's motion for summary disposition of his § 2255 motion, Olis has not provided the court with any reason to reconsider its denial of his motion for discovery. The court can only conclude that Olis' motion for reconsideration is based not on new facts or arguments but, instead, on the same facts and arguments previously raised and previously rejected by the court in the March 3, 2008, Memorandum Opinion and Order (Docket Entry No. 344).

Accordingly, Olis' motion for reconsideration will be denied.

VI. *Certificate of Appealability*

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." 28 U.S.C. § 2255(d).

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability" (COA). 28 U.S.C. § 2253(c)(1)(B). Although Olis has not yet filed a notice of appeal, this court nonetheless addresses whether he would be entitled to a COA. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir.2000) (A district court may *sua sponte* rule on a COA because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931

(2003). To warrant a grant of the COA as to claims denied on their merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000). This standard requires a § 2255 movant to demonstrate that reasonable jurists could debate whether the motion should have been resolved differently, or that the issues presented deserved encouragement to proceed further. *United States v. Jones,* 287 F.3d 325, 329 (5th Cir.), *cert. denied,* 123 S.Ct. 1549 (2002) (relying upon *Slack,* 120 S.Ct. at 1603-04). The court concludes that reasonable jurists could not debate the denial of Olis' § 2255 motion on substantive grounds nor find that the issues presented are adequate to deserve encouragement to proceed. Accordingly, Olis is not entitled to a COA as to his claims.

VII. *Conclusions and Order of Dismissal*

For the reasons explained above, the United States' Motion for Summary Denial of Jamie Olis' motion to vacate (Docket Entry No. 346) is **GRANTED**; Olis' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket Entry No. 305) is **DENIED;** and Olis' Motion for Reconsideration of Olis' Motion for Discovery (Docket Entry No. 349) is **DENIED**. The court also **DENIES** Olis a Certificate of Appealability.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20836

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMIE OLIS,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

---

(Filed Sep. 14, 2009)

Before KING, STEWART and HAYNES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is denied.